Received 11/02/2015 Commonwealth Court of Pennsylvania

Filed 11/02/2015 Commonwealth Court of Pennsylvania
1167 CD 2015

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LOREN KISKADDEN, Petitioner,	:	
v.	:	No. 1167 CD 2015
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent,	:	
and	:	
RANGE RESOURCES-APPALACHIA, LLC, Intervenor.	:	

THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSE TO PETITIONER'S APPLICATION TO VACATE AND REMAND TO PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

The Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP") files the following Response ("Response") to Petitioner's Application to Vacate and Remand to the Pennsylvania Environmental Hearing Board ("Application"). The Department is concurrently filing a memorandum in support of this Response ("DEP's Memorandum in Support").

The DEP responds as follows:

1. Admitted in part, no response in part. Admitted that Petitioner filed the Application concerning an adjudication dated June 12, 2015 ("EHB Adjudication") of the Pennsylvania Environmental Hearing Board ("EHB" or "Board").[1] No response is required to the summary of the EHB Adjudication, which speaks for itself and is legal argument. To the extent a response is required, Mr. Kiskadden's "claim of water contamination" was addressed in the EHB Adjudication. The EHB Adjudication is attached hereto as "DEP Exhibit A."

2. No response required. The matters described in this paragraph were addressed in the EHB Adjudication on appeal before this Court. The Department will address Mr. Kiskadden's contentions regarding the EHB Adjudication in its response to his brief. Pa. R.A.P. 1516(a).

3. The response to paragraph 2 is restated in its entirety.

4. The response to paragraph 2 is restated in its entirety.

5. The response to paragraph 2 is restated in its entirety.

6. The response to paragraph 2 is restated in its entirety.

7. The response to paragraph 2 is restated in its entirety.

8. Admitted in part, no response in part. Admitted that the EHB proceeding was lengthy. No response is required to statements regarding

[1] DEP was served on October 14, 2015 via PACFile, which results in a response deadline of November 2, 2014. Pa. R.A.P. 107 (referencing 1 Pa. C.S. § 1908), 121, 123, 125.

Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of the scope of the appellate jurisdiction of this proceeding and to which DEP is not a party.

9. Admitted that Mr. Kiskadden served discovery on Range.

10. No response is required. Range and Mr. Kiskadden are better positioned to describe their discovery dispute. To the extent a response is required, the record and the EHB Adjudication speak for themselves.

11. The response to paragraph 10 is incorporate herein in its entirety.

12. No response is required. Range and Mr. Kiskadden are better positioned to describe their discovery dispute. To the extent a response is required, the record and the EHB Adjudication speak for themselves.

13. The response to paragraph 12 is restated in its entirety.

14. The response to paragraph 12 is restated in its entirety.

15. The response to paragraph 12 is restated in its entirety.

16. The response to paragraph 12 is restated in its entirety.

17. The response to paragraph 12 is restated in its entirety.

18. The response to paragraph 12 is restated in its entirety.

19. The response to paragraph 12 is restated in its entirety.

20. The response to paragraph 12 is restated in its entirety.

21. Admitted in part, no response is required. Admitted that the Board issued an order on June 10, 2014, which speaks for itself and is part of the record in this Appeal. (R. 2938a.) No response is required to the footnote numbered 4 which claims that the Board failed to utilize the "rebuttable presumption." The record and the EHB Adjudication show that it was Mr. Kiskadden who failed to utilize the rebuttable presumption effectively. To the extent a further response is required, Mr. Kiskadden's failure to meet his burden of proof is explained in the EHB Adjudication. (DEP Exhibit A, EHB Adjudication.) DEP may address the application of the "rebuttable presumption" when it files its brief in this Appeal.

22. Admitted in part, no response is required. Admitted that the Board issued an order on June 10, 2014, which speaks for itself and is part of the record in this Appeal. (R. 2938a.) No response is required to whether the June 10, 2014 EHB Order was appropriate because that legal issue was not preserved in Mr. Kiskadden's brief filed with this Court on September 22, 2015 ("Petitioner's Brief") or in his Petition for Review, filed on July 9, 2015. Pa. R.A.P. 2116(a). No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

23. Admitted.

24. No response is required. To the extent a response is required, the record and the EHB Adjudication speak for themselves.

25. No response is required. To the extent a response is required, the record and the EHB Adjudication speak for themselves.

26. Admitted.

27. Admitted.

28. Admitted in part, no response required in part. Admitted that Mr. Kiskadden filed an appeal of the EHB Adjudication with this Court. No response is required to restatements of Petitioner's Brief and the Petition for Review, which speak for themselves.

29. No response is required. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

30. The response to paragraph 29 is restated in its entirety.

31. The response to paragraph 29 is restated in its entirety.

32. The response to paragraph 29 is restated in its entirety.

33. No response is required. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

34. The response to paragraph 33 is incorporated herein in its entirety.

35. Legal argument; no response required. If a response is required, denied that Mr. Kiskadden's Application warrants relief.

36. Admitted in part, no response required in part. Admitted that Mr. Kiskadden filed the Application. No response is required to Petitioner's unsupported statement regarding whether evidence was newly discovered or withheld.

37. Admitted in part, no response required in part. Admitted that Mr. Kiskadden cited Rule 1551(a)(3) in his Application. No response is required to the remaining legal argument. If a response is required, Mr. Kiskadden failed to include the matters asserted regarding newly discovered documents in Petitioner's Brief or in the Petition for Review. He also failed to use available avenues of relief under the Board's rules to raise the issue before the Board (*see* Paragraph 38 below). As a result, those matters are waived. Pa. R.A.P. 1512(a), 1551(a), 2116(a); *Mooney v. Greater New Castle Development Corporation*, 510 A.2d 344, 348 n.4 (Pa. 1986); *East Allegheny School District v. Secretary of Education*, 603 A.2d 713, 717 n.5 (Pa. Cmwlth. 1992).

38. Admitted in part, no response required in part. DEP admits that this Court's appellate role is not that of a fact-finder. DEP admits that the cases cited

by Mr. Kiskadden exist. No response is required to legal argument. To the extent that a response is required, the Application does not demonstrate that Petitioner is entitled to relief in the form of remand and the vacation of the EHB Adjudication, because of, *inter alia*, the lack of verified facts in the Application, the failure to meet legal standard for remand, and waiver.

No response required to legal argument. To the extent that a response is required, it is denied that Petitioner has demonstrated that this matter should be remanded. The Application itself reveals that the evidence of "tracers" is not, in fact, newly-discovered evidence. Paragraph 55 of the Application establishes that on April 10, 2015, Mr. Kiskadden "discovered" evidence of Range's use of "tracers." This date is prior to the Board's June 12, 2015 Adjudication and was within the timeframe to ask the Board to reopen the record prior to adjudication. 25 Pa. Code § 1021.133 (*see* Paragraph 55, below). April 10, 2015 was also well within the timeframe to seek reconsideration before the Board, and months before Mr. Kiskadden filed his Petition for Review and Petitioner's Brief. 25 Pa. Code § 1021.152 (petitions for reconsideration may be filed within 10 days of the date of the final order of the Board); Pa. R.A.P. 1512, 1513, 2116. Petitioner's failure to seek to reopen the record or to seek reconsideration is evinced by the Board's docket in this case, which shows no activity between the filing of the parties' reply

briefs and the Adjudication. (*See* DEP Exhibit E, EHB Docket Sheet for Dkt. No. 2011-149-R.[2])

39. The issue of "tracers" is not "after-acquired" and does not warrant remand to the Board. Mr. Kiskadden's or his counsels' decision to not raise this issue in the proceeding before the lower fact-finding tribunal has resulted in waiver, and there is no need to evaluate the substantive factors regarding remand. Arguments in DEP's Memorandum In Support are incorporated herein by reference.

40. No response is required to legal argument. To the extent that a response is required, *Gamma Swim Club* is factually distinguishable in that the *Gamma* Court denied remand to consider events that occurred following the original proceeding. *Gamma Swim Club, Inc. v. Com. Dept. of Transp.*, 505 A.2d 342, 343 (Pa. Cmwlth. 1986). In contrast, the instant matter involves facts discovered prior to the Board's Adjudication which could have been raised to the Board or, at the latest, in Petitioner's Brief or Petition for Review.

41. No response is required to legal argument. To the extent that a response is required, admitted that *Gamma Swim Club*, 505 A.2d at 343, states that

[2] This court may take judicial notice of the EHB's docket. Pa.R.E. 201. The docket sheet has been provided as a courtesy to the Court.

four criteria must be established to obtain remand, but denied that Mr. Kiskadden satisfies these criteria.

42. No response is required to legal argument. To the extent that a response is required, Mr. Kiskadden improperly relies on *Perkiomen Twp. v. Mest*, 499 A.2d 706 (Pa. Cmwlth. 1985), for the principle that extensive depositions constitute due diligence. Unlike *Mest*, which involved a party surprised by a recanting witness post-adjudication, the instant matter involves facts that were discovered post-discovery but before the Board's Adjudication in this matter. *See* Paragraphs 38 and 55. Accordingly, the issue of whether Mr. Kiskadden exercised "diligence" during discovery has no bearing on whether he acted *at all* upon learning of the "tracers" by raising the issue with the Board before its Adjudication *See* Paragraph 38, above, and DEP's Memorandum in Support.

43. No response is required to legal argument.

44. The Department's response to Paragraph 43 is restated in its entirety.

45. The Department's response to Paragraph 43 is restated in its entirety.

46. No response is required to legal argument. To the extent a response is required, DEP denies that the Application demonstrates that Petitioner is entitled to a remand. The record and the EHB Adjudication speak for themselves. To the extent a further response is required, the four corners of the Application do not

show that Mr. Kiskadden's or his counsels' diligence was "due," *i.e.*, of the proper quality or extent; adequate.

47. No response is required.

48. No response is required to Mr. Kiskadden's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery dispute. To the extent a response is required, the actual record and the EHB Adjudication speak for themselves.

49. The response to Paragraph 48 is restated in its entirety.

50. The response to Paragraph 48 is restated in its entirety.

51. The response to Paragraph 48 is restated in its entirety.

52. The response to Paragraph 48 is restated in its entirety.

53. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery dispute.

54. No response is required. To the extent a response is required, the response to Paragraph 39 is restated in its entirety. *See* DEP's Memorandum in Support.

55. No response is required to Mr. Kiskadden's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party. To the extent a response is required, the "new evidence" identified by Mr. Kiskadden in Paragraph 55 of the Application is described as follows:

> Mr. Kiskadden discovered months later for the first time that Range was aware, but failed to disclose the use of, products containing chemical "tracers" used at the Yeager Site. This information was initially revealed on or about April 10, 2015 through the deposition of a Multi-Chem Group, LLC ("Multi-Chem") representative.

(Application ¶ 55.) The deposing attorney was Mr. Kiskadden's own counsel, "Ms. Smith." (Application Exhibit 24.) Before this deposition, Mr. Kiskadden had known for almost two years that Multi-Chem's product "2510T" was used at the Yeager Site, based on a letter from Range dated August 20, 2013. (Application Exhibit 9.) At the deposition on April 10, 2015 a witness of Multi-Chem explained that the "T" in the product "2510T" means that the product contains a tracer. (Application Exhibit 24.) Thus, the new "tracer" information was known by Mr. Kiskadden's counsel of record on April 10, 2015. As explained in Paragraph

38, above, and in the DEP's Memorandum in Support, Mr. Kiskadden could have moved the Board to reopen the record on that date, as the Adjudication had not yet been issued. After the date of the EHB Adjudication, he could have sought reconsideration from the EHB. 25 Pa. Code §§ 1021.133 and 1021.152. This date also pre-dated all of the filing deadlines in Mr. Kiskadden's appeal to this Court. *See* Paragraph 38, above, and DEP's Memorandum in Support. Due to the delay in raising these issues, they are waived, and no relief is warranted. Questions not raised before the lower tribunal may not be raised on appeal. Pa. R.A.P. 1551(a). Moreover, by failing to raise this issue in his Petition for Review or in his legal brief, Mr. Kiskadden has also waived this issue. Pa. R.A.P. 2116(a); *Berner v. Montour Twp.*, 120 A.3d 433, *slip op.* 7-8 n.6 (Pa. Cmwlth. 2015) (stating that failure to develop an issue in a brief constitutes waiver). *See* DEP's Memorandum in Support.

56. No response is required to Mr. Kiskadden's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas.

57. Paragraph 56 is restated in its entirety.

58. Paragraph 56 is restated in its entirety.

59. No response is required to Mr. Kiskadden's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party. To the extent a response is required, denied. Mr. Kiskadden's statement that a "tracer" is used to find out where the "fluids have reached following injection" does not follow from any of the quoted statements in the Application. Rather, the quote in the preceding paragraph, Paragraph 58 of the Application, states that tracers are used to "estimate what volume of flowback[3] is coming . . . ."

60. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

61. The response to Paragraph 60 is restated in its entirety.

62. The response to Paragraph 60 is restated in its entirety.

[3] "Flowback water is water-based fracturing fluid that flows back to the surface after the completion of hydraulic fracturing." (DEP Exhibit A, EHB Adjudication at 11, ¶ 29).)

63. The response to Paragraph 60 is restated in its entirety.

64. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party. To the extent a response is required, the alleged "new evidence" was known by Mr. Kiskadden's counsel when his counsel sent the "Notice" (as defined in the Application), on some unknown date between mid-June and late August 2015, for the purpose of obtaining documents regarding tracers. That period of time was before the date that Mr. Kiskadden filed his Petitioner's Brief and the Petition for Review in this Appeal, thereby making the evidence not "new." This provides further support for the argument in Paragraphs 39 and 55, above, that this matter could have been raised before the Board before the date that he filed his Petition for Review, July 9, 2015, resulting in waiver.

65. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's

civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party. To the extent a response is required, the "new evidence" identified by Mr. Kiskadden in Paragraph 65 of his Application was sent to his counsel on August 27, 2015. His counsel knew of this "tracer" issue on April 10, 2015 and chose not to act. Although they had this knowledge, Mr. Kiskadden's counsel never sought to reopen the record, seek reconsideration, or even extend critical filing deadlines. Whether there was a lack of diligence or strategy is unknown. In any event, due to the delay, there is waiver, and no relief is warranted. *See* Paragraphs 39 and 55, above, and DEP's Memorandum in Support.

66. The response to Paragraph 65 is restated in its entirety.

67. The response to Paragraph 65 is restated in its entirety.

68. The response to Paragraph 65 is restated in its entirety. To the extent a response is required, Mr. Kiskadden's statement that the tracer "would allow Range to track how far its fracturing fluids had travelled" does not follow from any of the quoted statements in the Application. Rather, the quote in Paragraph 58 of the Application states that tracers are used to "estimate what volume of flowback is coming . . . ." (Application ¶ 58.)

69. No response is required. To the extent a response is required, the record and the EHB Adjudication speak for themselves. No response is required to legal argument that the information set forth in the Application would have resulted in a different result than occurred on the record of the EHB Adjudication. No response is required to legal argument that the Board should have the opportunity to review information set forth in the Application that does not appear to be technically "new" as set forth above. Some or all of the information was known by Mr. Kiskadden's counsel prior to critical filing deadlines that his counsel never sought to extend, given the existence of this information. Petitioner did not avail himself of opportunities to raise the issue of "new" evidence before the Board by moving to reopen the record or seeking reconsideration. 25 Pa. Code §§ 1021.133 and 1021.152. *See* Paragraph 39, above.

70. Legal argument, no response is required. To the extent a response is required, the record and the EHB Adjudication speak for themselves. In addition, Mr. Kiskadden lists no "findings" that the Board made in Paragraph 70 of his Application. No response is required to this unsupported argument.

71. No response is required. Besides pointing to several receipts, Paragraph 71 of the Application includes unsupported factual statements and conclusions that do not warrant a response.

72. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

73. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

74. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

75. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

76. No response is required. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party. To the extent a further response is required, Application Paragraph 76 includes factual statements without reference to any exhibits. In addition, Mr. Kiskadden's statement that the tracer "would allow Range to track how far its fracturing fluids had travelled" does not follow from any of the quoted statements in the Application. Rather, the quote in Paragraph 58 of the Application states that tracers are used to "estimate what volume of flowback is coming . . . ." (Application ¶ 58.)

77. No response is required to Petitioner's legal argument characterizing the adequacy of Range's discovery compliance. Range and Mr. Kiskadden are

better positioned to describe their discovery disputes. No response required to legal argument. To the extent a further response is required, Mr. Kiskadden's claims that any "new evidence" should give rise to more sanctions from the Board should be rejected because he and his counsel chose not to seek to reopen the record, seek reconsideration, or include these issues in his Petition to this Court and, therefore, have waived the right to seek relief based on these issues now. *See* Paragraphs 39 and 55, and DEP's Memorandum in Support.

78. No response is required. Application Paragraph 78 includes factual statements without reference to any exhibits. As a result, these statements are unsupported and should be stricken. Subject to the foregoing, EPA Test Method 200.8 does include antimony, and EPA Test Method 200.8 was utilized by the Department's laboratory when it analyzed a water sample from Mr. Kiskadden's water well in June 2011, though the antimony result was not requested, verified, or reported. (*See* Exhibit 17 to Application.)

79. Admitted in part, denied in part. No response is required to unsupported statements. Admitted that antimony is included in EPA test Method 200.8. Denied that the June 6, 2011 water sampling results show that antimony was in Mr. Kiskadden's water. Mr. Kiskadden points to a *spiked quality control*

sample result as representative of his water quality. (*See* Exhibit 17 to Application.) The following explains this error.

The documents attached to the Application as "Exhibit 17" include "Reported Results" with Bates numbers Range-Haney000105-106. *Id.* Those Reported Results include the verified results[4] for the sample with the identification number ending "15947." *Id.* For example, the verified sample result[5] for arsenic is described on page "Range-Haney000106" as less than 3 micrograms per liter (<3.0 ug/L) and as tested with EPA 200.8 Test Method. *Id.* The two following pages of Exhibit 17 (pages "DEP000130" and "DEP000131"), however, are what are known as "raw data." *Id.* These pages of quality-control documentation include raw data of a spiked amount of Mr. Kiskadden's water (identified as sample ID 15947). *Id.* That raw data is, therefore, not representative of the quality of Mr. Kiskadden's water, but rather evidence of the quality control spike added to an amount of his water. *Id.* This is evident by inspecting the pages DEP000130-DEP000131. *Id.* The level for arsenic on Page DEP000130 in the "Conc. Mean" column is 105.658 ug/L, well above the reported level of arsenic of less than 3 micrograms per liter, as set forth on page Range-Haney000106. *Id.* This level is

[4] "Raw data must be verified by a laboratory analyst to be considered reliable." (DEP Exhibit A, EHB Adjudication at 27, ¶ 168.)

[5] A verified sample result is a document prepared by a laboratory analyst, verifying the accuracy of the reported results after the raw data.

described as a percentage of the spike recovery on the following page, DEP000131, in the column marked "Spike % RecDuplicated Rel." *Id.* Thus, with no further documents, comparing the raw data in Exhibit 17 to the reported results shows that the raw data is not representative of the quality of Mr. Kiskadden's water.

In addition, the Department has filed herewith as "DEP Exhibit B, Raw Data" pages from the record which include the EPA Test Method 200.8 raw data for the June 6, 2011 sampling of Mr. Kiskadden's water (identified as sample ID 15947). The raw data for Mr. Kiskadden's sample is set forth on page R.4601a, which is part of the reproduced record in this Appeal (other quality control documents that make up the rest of the raw data do not appear to be included in the reproduced record). The raw data for the antimony (Sb) concentration in the sample of Mr. Kiskadden's water (sample ID 15947) shows a negative number, indicating, at best, electronic noise.[6] This negative number is quantitatively less than both the reporting limit of 2 ug/L for Sb and also less than the EPA's Maximum Contaminant Level of 6 ug/L for Sb. Accordingly, assertions that the

[6] "'Electronic noise' means that the analyst is not able to determine whether the analyte was actually detected or whether it is simply the result of the instrument's background signal." (DEP Exhibit A, EHB Adjudication at 27, ¶ 171.)

June 6, 2011 DEP sample results or raw data show that Sb/antimony was present in Mr. Kiskadden's water are denied.

With regard to Footnote 16 of the Application, the Department has addressed prior misrepresentations of DEP's use of standard analysis codes in pre-trial findings. (See *e.g.*, DEP Exhibit E, EHB Docket No. 2011-149-R, Item No. 205 ¶ 31 and Item No. 391 ¶¶ 57-60.) No further response is required because the statements are unsupported.

80. Admitted in part, denied in part. As set forth in DEP's response to Paragraph 79, Mr. Kiskadden filed no documents showing that there was antimony in his water. The raw data filed herewith by the Department, if verified by a laboratory professional as accurate, would show that Mr. Kiskadden had either zero or such a low amount of antimony that the Bureau of Laboratories' machines ascribed a negative value to it. Admitted that the Maximum Contaminant Level (MCL) for antimony is 6 ug/L or 0.006 mg/L. Denied that a negative, unverified result for antimony in the raw data for Mr. Kiskadden's June 6, 2011 sampling is above the MCL for antimony.

81. No response required in part, denied in part. As set forth in Paragraph 79, above, Mr. Kiskadden has presented no evidence that antimony is in his water, and the evidence of record shows that it is likely not present. If antimony had been

used as a tracer at the Yeager Site, then there would be no reason to conclude Range's Yeager Site affected Mr. Kiskadden's water because there is no evidence of antimony in his water. To the extent a further response is required, the Board's conclusion remains correct: minor detections of naturally occurring constituents are not enough to prove a hydrogeologic connection. Rather, chlorides, in elevated concentrations greater than concentrations of sodium, calcium, and other constituents, in that declination, are indicative of pollution from oil and gas fluids, and were not evident in Mr. Kiskadden's water. (DEP Exhibit A, EHB Adjudication at 12, 19, 42-44.) Evidence of record in this case proved this to be true when releases from the Yeager Site polluted the nearby Yeager farm's springs and results showed elevations of these constituents with this profile. *Id.* at 12, 37-38.

82. The Department's response to Paragraph 81 is re-stated in its entirety.

83. No response is required in part, denied in part. Denied that Mr. Kiskadden's statement that tracers are used to "determine the distances [that] hydraulic fracturing fluids had travelled" follows from any of the quoted statements in his Application. Rather, the quote in Paragraph 58 of the Application states that tracers are used to "estimate what volume of flowback is coming . . . ."

To the extent a further response is required, Paragraphs 79 and 80 are restated in their entirety.

84. No response is required to argument; statements of fact are denied. To the extent a further response is required, Mr. Kiskadden's statement that tracers are used to "determine the distances [that] hydraulic fracturing fluids had travelled" does not follow from any of the quoted statements in his Application. Rather, the quote in Paragraph 58 of the Application states that tracers are used to "estimate what volume of flowback is coming . . . ." No response is required to legal argument regarding the EHB Adjudication. The EHB Adjudication speaks for itself. To the extent a response is required, the record shows that Mr. Kiskadden did not meet his burden to prove a hydrogeological connection between the Yeager Site and his Water Supply, but, instead, created a lengthy record based on detections of constituents that could have come from his own scrapping activities, his family's scrap facility, or other nearby uses. (DEP Exhibit A, EHB Adjudication.) Further, antimony testing, if verified, did not show even a detection of antimony. Responses to Paragraphs 79 and 80 are restated in their entirety.

85. Admitted in part, denied in part, no response required in part. Denied that there is evidence of antimony in Mr. Kiskadden's water. (Paragraphs 79 and

80, above, are restated in their entirety). Admitted that the Board found that there are many naturally occurring chemicals in groundwater. No response is required to legal argument regarding the EHB proceeding. The EHB Adjudication speaks for itself.

86. Denied in part, no response required in part. Denied that there is evidence of antimony in Mr. Kiskadden's water. (Paragraphs 79 and 80, above, are restated in their entirety). The Department can neither admit nor deny Petitioner's assertions as to Range's knowledge. No response is required to legal argument regarding the witness's credibility, which was addressed in the EHB Adjudication, which speaks for itself. Further, witness credibility is within the EHB's province as fact-finder.

87. Denied in part, no response required in part. Denied that there is evidence of antimony in Mr. Kiskadden's water. (Paragraphs 79 and 80, above, are restated in their entirety). The Department can neither admit nor deny Petitioner's assertions as to Range's knowledge. No response is required to legal argument regarding Mr. Kiskadden's failure to meet his burden in the EHB proceeding, which was addressed in the EHB Adjudication, which speaks for itself.

88. No response required. No response is required to legal argument. To the extent a response is required, the four corners of the Application show that

Mr. Kiskadden's or his counsels' decision to delay raising the issue of "tracers" waived his ability to seek relief now, and Petitioner does not meet the criteria for remand. *See* Paragraph 39 and 55, and DEP's Memorandum in Support.

89. Admitted.

90. Admitted.

91. Admitted.

92. Admitted.

93. No response required. No response is required to legal argument regarding the meaning or import of Range's testimony.

94. No response is required. No response is required to whether Mr. Kiskadden relied on a stipulation. The Joint Stipulation, as defined in the Application, speaks for itself.

95. No response is required to legal argument regarding the Joint Stipulation. The Joint Stipulation, as defined in the Application, speaks for itself.

96. No response is required. To the extent a response is required, Mr. Kiskadden, other plaintiffs, Range, other defendants, and Universal are better positioned to discuss discovery in the civil litigation proceeding in the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's

civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

97. The response to paragraph 96 is restated in its entirety.

98. The response to paragraph 96 is restated in its entirety.

99. The response to paragraph 96 is restated in its entirety.

100. The response to paragraph 96 is restated in its entirety. To the extent a further response is required, this paragraph shows Mr. Kiskadden's misunderstanding of the EHB Adjudication's "rebuttable presumption." Mr. Kiskadden argues that allegedly new evidence shows the existence of ethyl benzene and toluene in both his water and a product used at the Yeager Site. However, if ethyl benzene and toluene were detected in his water, then the rebuttable presumption already presumed them to also have been in a product used at the Yeager Site. (DEP Exhibit A, EHB Adjudication, at 30-31.) Thus, the newly presented information regarding the ingredients of products used at the Yeager Site would have no effect on the Board's Adjudication because the constituents of Mr. Kiskadden's water were already presumed to have been at the Yeager Site. Mr. Kiskadden did not appeal the rebuttable presumption to this Court. As a result, no relief is warranted based on these allegedly new facts

because they would have no effect on the outcome due to the rebuttable presumption. *See* DEP's Memorandum in Support.

This Court's decision to not grant Mr. Kiskadden's request based on this cumulative information would not preclude Mr. Kiskadden from seeking other remedies in his Common Pleas proceeding and would not affect his co-plaintiffs. 58 Pa. C.S. § 3218(f); *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1999).

101. Admitted.

102. No response required. No response is required to legal argument. To the extent that a response is required, the matters described in this paragraph were addressed in the EHB Adjudication on appeal before this Court. The Department will address Mr. Kiskadden's contentions regarding the EHB Adjudication to the extent they are set forth in Petitioner's Brief on file with this Court pursuant to the rules of this Court. Pa. R.A.P. 2112. To the extent a further response is required, the Department restates its response to Paragraph 100 in its entirety.

103. The response to Paragraph 102 is restated in its entirety.

104. Admitted in part, no response required in part. Admitted that the Board found that Mr. Kiskadden's water quality is consistent with the water type in his area of Washington County. No response is required to Mr. Kiskadden's summary of the EHB Adjudication; the EHB Adjudication speaks for itself.

105. Denied. It is denied that Mr. Kiskadden recently discovered evidence that demonstrates the sources of pollution. The Department is without knowledge of the information known to Range. To the extent a further response is required, no evidence identified in the Application "conclusively demonstrates that Mr. Kiskadden's water is polluted such that it does not represent typical groundwater chemistry." Response to Paragraph 104 is restated in its entirety.

106. No response is required. Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. No response is required to statements regarding Mr. Kiskadden's civil litigation in the Court of Common Pleas, which is outside of this proceeding and to which DEP is not a party.

107. No response is required in part, denied in part. No response is required because Range and Mr. Kiskadden are better positioned to describe their discovery in the action before the Court of Common Pleas. Denied that the EHB "failed to address" evidence in the EHB Adjudication, as set forth in the Application's 23rd footnote. The Department will address Mr. Kiskadden's contentions regarding the EHB Adjudication to the extent that those statements are also set forth in Petitioner's Brief on file with this Court, pursuant to the rules of this Court. Pa. R.A.P. 1516(a). No response is required because the Application

lacks facts sufficient to provide a response, *i.e.*, the unverified Application does not identify the date that Mr. Kiskadden or his counsel received the ATSDR letter.

To the extent a further response is required, Paragraph 107 of the Application describes a draft letter from a Federal agency that does not appear to be a party to any action involving Mr. Kiskadden. The truth of the statements in that letter has not been verified by anyone, and the letter was never signed. The letter is hearsay, warranting no relief. Pa. R.E. 801(c); *Commonwealth v. Small*, 980 A.2d 549, 577 (Pa. 2009). Further, the letter contains hearsay opinions and would be inadmissible before the EHB. *Groce v. Department of Environmental Protection*, 921 A.2d 567, 582-83 (Pa. Cmwlth. 2007). [7]

The ATSDR letter summarizes a prior discussion between EPA, ATSDR, and Petitioner regarding his water well quality. Thus, it provided no new information to Petitioner. (Application Exhibit 23, second paragraph). Similar concerns were set forth by the Department in its letter to Mr. Kiskadden that was appealed to the EHB, making the ATSDR statements cumulative. (DEP Exhibit C,

[7] Mr. Kiskadden's counsel successfully argued that a similar letter from the Environmental Protection Agency ("EPA Letter") to Mr. Kiskadden stating similar information should *not* be part of the record. (R. 737a, including N.T. 1886-88; DEP Exhibit D, EPA Letter.) Mr. Kiskadden's counsel described the EPA Letter as "hearsay," arguing that it should not be admitted, or even referenced as a cover-letter, because the author was not present, either to authenticate or to testify regarding the letter. *Id.* She clarified her concerns by noting there is "no way of knowing that [the author] actually wrote what is contained in there or he was helped by someone else in this other government agency to write that letter." *Id.*

September 9, 2011 Letter, w/o enclosures, R. 6905a- 6908a.) As a result, this letter presents no new information, is not competent evidence, and would be cumulative of existing information. In addition, this letter would not compel a different result from the EHB because it is neither authoritative nor provides any insights that were not already considered in the EHB's Adjudication. (*See* DEP Exhibit A, EHB Adjudication.)

Accordingly, this letter is cumulative, it is hearsay, and it is not likely to compel a different result. Therefore, this draft letter from a Federal agency does not warrant another evidentiary hearing before the Board. Pa. R.A.P. 1551; Pa. R.E. 801(c); *Commonwealth v. Small*, 980 A.2d 549, 577 (Pa. 2009); *Commonwealth v. Parker*, 431 A.2d 216, 218 (Pa. 1981); *Commonwealth v. Council*, 421 A.2d 623, 626 (Pa. 1980).

108. No response required. No response is required as to Mr. Kiskadden's knowledge, and such statements should be stricken because he did not sign a verified statement and attach it the Application. Pa. R.A.P. 123(a) (as defined in Rule 102, a "verified statement" applies to statements of fact filed with this Court). To the extent a response is required, the Department restates its response to Paragraph 107 in its entirety. In addition, the Application does not identify the date that Mr. Kiskadden or his counsel received the ATSDR letter.

109. No response required in part, denied in part. No response is required to legal argument. Denied that ATSDR made any final determinations. Denied that the EHB stated that Mr. Kiskadden's water "was drinkable." In addition, the Board expressly found that groundwater does not always meet drinking water standards, *e.g.*, MCLs. (DEP Exhibit A, EHB Adjudication at 23, ¶ 130.) To the extent a response is required, the Department restates its response to Paragraph 107 in its entirety.

110. The Department restates its response to Paragraph 109 in its entirety.

111. The Department restates its response to Paragraph 109 in its entirety.

112. No response required in part, denied in part. No response is required to legal argument. To the extent that a response is required, it is denied that the Application warrants relief from this Court. As is set forth in the DEP's Memorandum in Support filed herewith, Mr. Kiskadden's counsel had knowledge of the products used at the Yeager Site in 2013 and found out in April 2015 that one of those products had a "tracer." These facts reveal that this Application is an attempt to circumvent well-established administrative and appellate rules by raising an issue that could have been raised with the fact-finder by moving to reopen the record or by seeking reconsideration. 25 Pa. Code §§ 1021.133, 1021.152. Petitioner did not do so. Therefore, this issue is waived pursuant to Pa.

R.A.P. 1551(a). Further, the issue is waived because it was not raised in the Petition for Review or Brief. See Paragraph 55, above.

As for the ATSDR letter and identity of two chemicals, these things do not satisfy the criteria for remand. The Application is replete with hearsay and cumulative information, none of which would have led to a different result.

Due to the failure to set forth any cognizable basis to vacate and remand, the Application warrants no relief.

WHEREFORE, based on its Response to the Application and the Memorandum in Support of the Response, DEP respectfully requests that the Court deny Petitioner's Application to Vacate and Remand to Pennsylvania Environmental Hearing Board.

Respectfully submitted,

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FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date: November 2, 2015