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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 MEMORANDUM IN SUPPORT OF ITS RESPONSE TO PETITIONER'S APPLICATION TO VACATE AND REMAND TO PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

The Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP") submits this memorandum in support of its Response to Mr. Kiskadden's Application to Vacate and Remand to the Pennsylvania Environmental Hearing Board ("Application"). This Memorandum expands upon some of the arguments in opposition to the Application in the Department's Response.

I. INTRODUCTION

Mr. Kiskadden complained that Intervenor Range Resources-Appalachia, LLC's ("Range") activities at its Yeager Well Site degraded his water supply. Following an investigation, the Department determined that oil and gas activities were not the cause of his water problems. Mr. Kiskadden appealed the Department's decision to the Pennsylvania Environmental Hearing Board ("Board" or "EHB"). Following a 20-day hearing, the Board denied Mr. Kiskadden's appeal.

In his Application, Mr. Kiskadden argues that this Court should vacate the EHB's order and remand this matter for further proceedings because of the purported discovery of new "after-acquired evidence. (Application at 48.) This purported after-acquired evidence consists of: 1) information about chemical additives known as "tracers" used in hydraulic fracturing fluids at the Yeager Well Site; 2) a "draft" letter from the United States Agency for Toxic Substances and Disease Registry ("ATSDR"), dated September 27, 2013, which reports and interprets certain water quality data for Mr. Kiskadden's well water; and 3) information that a product used at the Yeager Well Site, SP -43X/Unhib A, contained ethyl-benzene and toluene. *Id.* at 23-39, 43-48.

Mr. Kiskadden claims that he learned that products with tracers were used at Range's Yeager Well Site during an April 10, 2015 deposition in a related civil

case. (Application ¶ 55, Ex. 24.) In the deposition, a representative of Multi-Chem Group, LLC, testified that its product, MC S-2510T, contains a tracer. *Id.* At the time of this deposition, however, Mr. Kiskadden had known for almost two years that this product was used at Range's Yeager Well Site. In a letter from Range's counsel to Mr. Kiskadden's counsel, dated August 20, 2013, Range identified products used at Range's Yeager Site; MC S-2510T was identified. (Application Ex. 9, 4th page of table). *See* Application Ex. 7, ¶ 9 (EHB Order requiring Range to identify products used at Yeager Well Site). Thus, Mr. Kiskadden had knowledge that Range used tracers more than two months before the EHB's Adjudication was issued on June 12, 2015.

Mr. Kiskadden does not identify when he received the draft ATSDR Letter. (*See* Application ¶¶ 106-07, Ex. 23.) However, the Application suggests that it was received on May 1, 2015, which was almost one and one-half months before the Board issued its Adjudication. *Id.* Moreover, the draft ATSDR letter states that the letter summarized a March 2013 conversation between Mr. Kiskadden, ATSDR, and EPA representatives regarding the analytical results for Mr. Kiskadden's water well. Thus, the information in the letter was known to Mr. Kiskadden at the time of the EHB hearing in 2014. (Application Ex. 23, second paragraph).

Mr. Kiskadden also seeks relief based on his discovery in August 2015 that toluene and ethyl-benzene were present in a product used at the Yeager Site. (Application ¶ 100.)

II. SUMMARY

The Application should be denied. First, the information identified by Mr. Kiskadden is either not new or was already presumed to exist. All of this information was or could have been presented to the Board before its Adjudication or shortly thereafter. Mr. Kiskadden waived the right to raise this "new" evidence as a basis to overturn the Board's Adjudication by failing to raise issues before the Board or to this Court in his Petition for Review or his Brief. Moreover, Mr. Kiskadden has failed to show that he meets the elements required for a remand and new trial. Specifically, 1) Mr. Kiskadden did not exercise reasonable diligence to present the "after-acquired evidence" to the Board, and 2) Mr. Kiskadden failed to demonstrate that the evidence is not cumulative and would likely compel a different outcome before the Board.

III. ARGUMENT

A. There are No "New" Facts.

The facts in the three items identified in the Application were either known or presumed to exist prior to the Board's adjudication, and therefore were not "after-acquired." This information could have been presented to the Board.

Mr. Kiskadden learned that Range used products with tracers at the Yeager Site in April 2015, more than two months before the EHB's Adjudication was issued. As discussed below, Mr. Kiskadden had available remedies to place this evidence before the Board by moving to reopen the record or seeking reconsideration but failed to use them.

Mr. Kiskadden had ample time to raise the "tracer" issue with the Board but chose not to do so. He therefore elected to forego his administrative remedies to reopen the record and/or to seek reconsideration of the EHB's Adjudication. 25 Pa. Code §§ 1021.133 (Reopening of record prior to adjudication), 1021.152 (Reconsideration of final orders). Mr. Kiskadden's failure to seek to reopen the record or 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 to Response, EHB Docket Sheet for Dkt. No. 2011-149-R.[1])

The Application does not state when Mr. Kiskadden learned of the ATSDR Letter. The claim as to the letter should fail on that basis alone. (Application ¶¶ 106-07.) However, one could infer from the Application that a copy of the draft ATSDR letter was provided to Mr. Kiskadden on May 1, 2015. *Id.*[2] Assuming that Mr. Kiskadden received the letter on May 1, 2015, like the information on tracers discussed above, Mr. Kiskadden had available remedies to place this evidence before the Board by moving to reopen the record or seeking reconsideration, but failed to use them.

Furthermore, even if the draft *letter* was new to Mr. Kiskadden, the *information* in it was not. The ATSDR Letter summarizes a March 29, 2013 conversation between Mr. Kiskadden and representatives of ATSDR and EPA. (Application Ex. 23, second paragraph). Thus, the facts and analyses in the letter were known to Mr. Kiskadden for *several years* and cannot be characterized as "after-acquired."

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[1] 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.

[2] Paragraph 106 of the Application states that on May 1, 2015, Mr. Kiskadden received a copy of Range's Freedom of Information Act ("FOIA") Request to EPA. In the next paragraph (Paragraph 107), Mr. Kiskadden does not explain whether he received the FOIA response (including the ATSDR Letter) with Range's May 1, 2015 delivery of documents. It could be inferred from the order of these paragraphs, and the absence of a date indicating otherwise, that the ATSDR letter was received on May 1, 2015 as well.

Finally, Mr. Kiskadden claims that he learned that toluene and ethyl-benzene were used at the Yeager Well Site. (Application ¶ 100.) Mr. Kiskadden also avers that toluene and ethyl-benzene were detected in his water well. *Id.* If these substances were present in Mr. Kiskadden's water well, as he avers that they were, then they would have been subject to the EHB's "rebuttable presumption" and would have been *presumed* to have been present at the Yeager Well Site. (Application Ex. 6 at 10.) It would follow that these substances' presumed presence as a matter of law makes the fact of their presence on the Yeager Well Site not new or after-acquired.[3]

B. Mr. Kiskadden Waived the "After-Acquired Evidence" Issue by Failing to Preserve It.

The Rules of Appellate Procedure and case law require parties to timely raise issues before the proper tribunal to preserve them for review. Failure to do so results in waiver of such issues. By failing to timely raise and preserve his "after-acquired evidence" issue, Mr. Kiskadden has waived it.

The Rules of Appellate Procedure provide that the Court will not consider questions on appeal that were not previously raised before the quasi-judicial

[3] The Board's rebuttable presumption "eliminated the Appellant's need to prove that chemicals found in his water well were contained in products used at the Yeager site." (Exhibit 8 to Application, EHB Adjudication at 6.) Appellant still had the burden to prove a hydrogeologic connection. *Id.* at 31. Mr. Kiskadden did not appeal the Board's "rebuttable presumption" in his Petitioner's Brief or Petition for Review but, instead, only raised the Board's application of the presumption to the facts. (Petitioner's Brief at 33-35.)

agency, here the Board. Pa.R.A.P. 1551(a). The Rule provides a limited exception for instances where the petitioner "could not by the exercise of due diligence" have raised the issue earlier. Pa.R.A.P. 1551(a)(3).

That exception does not apply here. The facts set out in the Application show that Mr. Kiskadden knew that Range used products with tracers at the Yeager Well Site over two months before the Board issued its Adjudication. Had Mr. Kiskadden exercised due diligence, he would have raised the issue to the Board by filing a petition to reopen the record under Rule 133 of the Board's Rules of Practice and Procedure. 25 Pa. Code § 1021.133(b). This rule provides an adequate administrative remedy for precisely these circumstances.[4] Even after the Adjudication was issued, if Mr. Kiskadden had exercised due diligence, he could have raised the issue by seeking reconsideration of the Board's decision under Rule 152 of the Board's Rule of Practice and Procedure . 25 Pa. Code § 1021.152. Mr. Kiskadden also failed to use this available remedy. *See M&M Stone Co. v. DEP*, 2010 EHB 227, 231 (stating that a petition for reconsideration may be filed within 10 days of the Board's order). Thus, Mr. Kiskadden failed to exhaust his administrative remedies.

[4] *See Wheeling -Pittsburgh Steel Corp. v. Dep't of Envtl. Prot.*, 979 A.2d 931, 943 (Pa. Cmwlth. 2009) (discussing the factors the Board considers in reopening the record based on after-acquired evidence).

It is also well established by the Rules of Appellate Procedure and case law that issues not raised in a Petition for Review or a Brief are waived. Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions [in a brief] involved or is fairly suggested thereby."); *Berner v. Montour Twp.*, 120 A.3d 433, slip op. 7-8 n.6 (Pa. Cmwlth. 2015) (failure to develop an issue in a brief constitutes waiver).

Mr. Kiskadden raised the after-acquired evidence issue regarding tracers for the first time in the Application filed in mid-October 2015. It is not set forth in his Petition for Review, in his Brief, or even in his docketing statement.

The Application does not identify when Mr. Kiskadden received the ATSDR Letter. (Application ¶¶ 106-07.) Assuming, based on inference from the Application, that the letter was received by Mr. Kiskadden on May 1, 2015, Mr. Kiskadden has waived his opportunity to assert that the ATSDR Letter is after-acquired evidence by not raising the issue before the Board or this Court for the same reasons discussed above for "tracer" information.[5]

[5] As discussed in the prior section, because the ATSDR Letter merely summarizes a discussion about Petitioner's water well analysis results that occurred in March 2013, the information in the letter is not after-acquired.

Mr. Kiskadden, therefore, waived his purported "after-acquired evidence" issue by failing to timely raise it as required by the Rules of Appellate Procedure and precedent.[6]

C. Mr. Kiskadden Does Not Meet the Criteria for Remand.

Mr. Kiskadden does not meet the criteria for a remand to consider the purportedly after-acquired evidence. The party seeking remand must demonstrate that the after-acquired evidence: (1) was discovered after the "original proceeding"; (2) could not have been obtained by reasonable diligence before the hearing; (3) "is not cumulative or merely to impeach credibility"; and (4) "is likely to compel a different result." *Gamma Swim Club, Inc., v. Dep't of Transportation*, 505 A.2d 342, 343 (Pa. Cmwlth. 1986) (*citing R. & S. Millwork, Inc. v. Dep't of Transportation*, 401 A.2d 587 (1979)); *In re Lokuta*, 989 A.2d 942, 948 (Pa. Cmwlth. 2010).

The purported after-acquired tracer evidence does not satisfy the first two criteria. The Application admits that Mr. Kiskadden knew that Range used products with tracers at the Yeager Well Site over two months before the Board issued its Adjudication. *See* Section III.A, above. Yet, he was not diligent in

[6] As discussed above, if toluene and ethyl-benzene were detected in Mr. Kiskadden's water, the rebuttable presumption therefore applies, and the information on toluene and ethyl-benzene use at the Yeager Site adds no new information to the record. *See* Section III.A.

acting on this information by seeking to reopen the record or by seeking reconsideration.

Mr. Kiskadden did not exercise reasonable diligence to obtain the ATSDR Letter prior to the hearing. He did not make a records request to EPA or ATSDR, which, if these documents had the importance that Mr. Kiskadden advocates, would be exactly what a diligent party would do. Because he failed to take that step, he failed to exercise reasonable diligence to obtain the ATSDR Letter prior to the EHB hearing and does not meet the second *Gamma* criterion.

In addition, the Application does not identify when Mr. Kiskadden received the ATSDR Letter. (Application ¶¶ 106-07.) Assuming, based on inference from the Application, that Mr. Kiskadden received it on May 1, 2015, this was almost one and one-half months before the Board's Adjudication.[7] Had Mr. Kiskadden exercised reasonable diligence upon discovering this information, he could have sought redress before the Board by filing a petition to reopen the record under 25 Pa. Code § 1021.133(b). Even after the Adjudication was issued, he could have acted with reasonable diligence to preserve the issue through a petition for reconsideration. 25 Pa. Code § 1021.152. Identifying new evidence may be a

[7] Further, the information in the ATSDR Letter was known to Petitioner since March 2013. Thus, the information in the letter is not after-acquired. *See* Section III.A, above.

basis for reconsideration. *Id.* However, Mr. Kiskadden did not exercise either option.

The uncontested facts demonstrate that Mr. Kiskadden failed to exercise reasonable diligence to present the evidence to the Board. It follows that he failed to show that the first two criteria for remand are satisfied.[8]

In addition, Mr. Kiskadden fails to meet the last criterion for remand, showing that the after-acquired evidence is likely to compel a different result. *Gamma Swim Club,* 505 A.2d at 343.

In this case, Mr. Kiskadden broadly asserts that evidence of the "tracers" requires this Court to vacate and remand to the Board. (*See* Application ¶¶ 87-88.) The EHB held that Mr. Kiskadden failed to prove the existence of a hydrogeologic connection and rejected his appeal. (Application Ex. 8 at 1, 31, 35-39, 52-53, and 55.) Mr. Kiskadden points to analytical results purportedly showing high levels of antimony in his well water on June 6, 2011 as relevant to prove a hydrogeologic connection. (Application ¶¶ 78-86). Antimony is one of the "tracers" he asserts that Range used. (Application ¶¶ 72, 78).

Mr. Kiskadden's assertion must be rejected because it is simply wrong. The analytical results cited are not an analysis of the quality of Mr. Kiskadden's water.

[8] Petitioner's claims about toluene and ethyl-benzene are not expressly addressed because of the "rebuttable presumption." As discussed in Section III.A., above, this evidence would not add new information to the record because it was already presumed.

Rather, the results are for water from Mr. Kiskadden's well that had been "spiked" by the Department's laboratory by adding known amounts of substances, including antimony. This is done as part of the Laboratory's quality assurance and quality control procedures.

The actual results for Mr. Kiskadden's well water – *i.e.*, water not "spiked" – do not show that antimony is not present in his water. (*See* Department's Response to Application ¶¶ 79-80). Mr. Kiskadden presented no evidence of a "tracer" in his water. The ample record regarding the absence of proven tracers for oil and gas fluids (the characteristic "fingerprint" for oil and gas related waters is made up of elevated chlorides, sodium, calcium, and metals, in this order of concentration) shows that Mr. Kiskadden's "evidence" would not compel a different result. (Application Ex. 8 at 19 (Findings of Fact 97-101).)

The ATSDR Letter and the toluene and ethyl-benzene would not compel a different result regardless. The Board would likely exclude the ATSDR Letter as hearsay because it contains bare draft opinions without the opining expert available for cross-examination. *Groce v. Department of Environmental Protection*, 921 A.2d 567, 582-83 (Pa. Cmwlth. 2007). The Board refused to admit similar letters at the hearing in this matter. For example, upon Mr. Kiskadden's objection, the EHB excluded an EPA letter that interpreted water quality results for Mr. Kiskadden's well. The Board granted Mr. Kiskadden's counsel's objection

that the EPA's letter was inadmissible hearsay. (R. 737a (N.T. 1886-88).) Further, ATSDR's Letter is consistent with the Department's determination in this matter – *i.e.*, Mr. Kiskadden has poor quality water. (R. 6906a-6925a (Ex. DEP-13).) Thus, even if the ATSDR Letter was admissible, it would be cumulative and contrary to the third *Gamma Swim Club* criterion.

The toluene and ethyl-benzene documents are also cumulative. Mr. Kiskadden avers that toluene and ethyl-benzene were detected in his water well. (Application ¶ 100). As explained in Section III.A., above, under the "rebuttable presumption," it would have already been presumed that these substances were present at the Yeager Site. (Application Ex. 6 at 10). Thus, this information is not "likely to compel a different result."

Finally, *Gamma Swim Club*, the primary case that Mr. Kiskadden relies upon to support his Application, instructs that Mr. Kiskadden's claims of "substantial evidence" in his Brief and Petition for Review negate his claims that "new" evidence is likely to compel a different result. In *Gamma Swim Club*, this Court denied Gamma's motion for remand because Gamma asserted that the evidence it wanted to present on remand was "[not] necessary to its case." 505 A.2d at 343-44. Judge Craig, writing for the Court, held that Gamma's assertion that the evidence is not necessary "negates the requisite that the evidence to be considered is likely to compel a different result. . . ." 505 A.2d at 343-344.

In the instant matter, the entire gravamen of Mr. Kiskadden's appeal is that he presented more than sufficient evidence to prevail and that the Board ignored his extensive probative evidence. (*See e.g.*, Mr. Kiskadden's Brief at 16, Summary of Argument.) In other words, Mr. Kiskadden has argued to this Court that more evidence is not necessary to his case because the evidence already of record is more than sufficient for him to prevail. It follows that, applying this Court's teaching in *Gamma Swim Club*, Mr. Kiskadden's position that the evidence he presented to the EHB was more than adequate for him to prevail negates the final criterion and precludes remand.

IV. CONCLUSION

The forgoing, along with Department's Response to the Application, shows that the Application lacks merit and should be denied. The purported after-acquired information could have been presented to the Board. Mr. Kiskadden waived the issue he now seeks to advance by not timely raising it before the Board or this Court. Other "new" evidence is cumulative or just not evidence at all. Finally, Mr. Kiskadden has not demonstrated that he meets the criteria for remand that he advocates in the Application.

Accordingly, the Department respectfully requests that this Honorable Court deny Mr. Kiskadden's Application to Vacate and Remand to the Pennsylvania Environmental Hearing Board.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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