IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

BLUE EAGLE LAND, LLC, a West Virginia limited liability company, **COALQUEST DEVELOPMENT, LLC, a** foreign limited liability company, **CONSOLIDATION COAL COMPANY,** a foreign corporation, **HORSE CREEK LAND AND MINING COMPANY, a** West Virginia corporation, **NATIONAL COUNCIL OF COAL LESSORS, INC., a** West Virginia corporation, **PENN VIRGINIA OPERATING COMPANY, LLC, a** foreign limited liability company, **POCAHONTAS LAND CORPORATION, a** foreign corporation, **WEST VIRGINIA COAL ASSOCIATION,** a West Virginia non-profit corporation, **WPP LLC,** a foreign limited liability company, and **WOLF RUN** MINING **COMPANY, a** West Virginia corporation,	)	**Case No.: 08-CAP-171**
Petitioners,	)	
v.	)	
WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, a state agency, **CHESAPEAKE APPALACHIA, LLC, a** foreign limited liability company, **EASTERN AMERICAN ENERGY CORPORATION, a** West Virginia corporation, and **PETROEDGE RESOURCES (WV), LLC, a foreign** limited liability company,	)	
Respondents.	)	

REPLY BRIEF OF QUEST EASTERN RESOURCE LLC,
SUCCESSOR IN INTEREST TO PETROEDGE RESOURCES (WV), LLC

Respondent Quest Eastern Resource LLC ("Quest"), successor in interest to PetroEdge Resources (WV), LLC, herein responds to Petitioner Blue Eagle Land, LLC, et al.'s ("Petitioners") appeal of the orders of the West Virginia Oil and Gas Conservation Commission ("Commission") exercising jurisdiction over wells to be drilled more than twenty feet (20') into

the Onondaga Group formation and granting special field rules for such wells, even though the wells would not be completed in or below the Onondaga Group formation. Instead, the wells would only be completed and would produce gas only from the Marcellus Shale formation – the geologic formation immediately above the Onondaga Group formations.[1] It is these narrowly defined "misfit wells" – those drilled more than 20 feet into the Onondaga but completed only in or above the Marcellus – that are the subject of this appeal. The question is whether they are "shallow wells" subject to the jurisdiction of the West Virginia Department of Environmental Protection's Office of Oil and Gas under Chapter 22, Article 6 of the West Virginia Code, or "deep wells" subject to the jurisdiction of the Commission under Chapter 22C, Article 9 of the West Virginia Code.

In Petitioner's Initial Appeal Brief ("PIB"), Petitioners take the position that the misfit wells should be classified as shallow wells. Quest agrees with the Commission and, for the reasons explained below, believes that the wells are deep wells. As a preliminary matter, Quest encourages the court to carefully parse the record to avoid making any findings or conclusions not based upon the evidence introduced in the underlying agency proceeding. For example, the statement that "Conversely, the respondents have offered no evidence whatsoever that gas will be lost or wasted unless the wells are drilled on....[certain] spacing", PIB at 21, is hardly surprising because it was not an issue raised in the underlying proceeding and is being raised for the first time in this appeal. The same applies to many of the averments and allegations raised in earlier filings by the West Virginia Surface Owners Rights Organization. Factual averments in PIB paragraphs 24 – 29 were not a part of the evidence adduced in the proceeding below and therefore should not form the basis of any opinion in this proceeding. WV SORO also made

[1] For ease of reference, the Onondaga Group formations will be referred to herein simply as "the Onondaga" and the Marcellus Shale formation will be referred to simply as "the Marcellus."

numerous factual allegations that were not part of the record below and then bases arguments based upon those presumed facts (e.g., making arguments about well pressures from old treatises based upon the characteristics of shallow formations and not on the geologic characteristics of the Marcellus). Neither of those parties adduced any evidence whatsoever in the proceedings below and now want to bush-whack respondents for failure to do this or that – even though Petitioners or WV SORO has not established any factual predicate otherwise. See Administrative Procedures Act, W. Va. Code § 29A-5-4(f) (review shall be upon the record made before the agency). *See also*, Frymier-Halloran v. Paige, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") Bad law can be made when factual assertions outside the record are made without any opportunity to test those facts through cross-examination and the testimony of other witnesses.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION TO GRANT SPECIAL FIELD RULES FOR WELLS COMPLETED SOLELY IN THE MARCELLUS SHALE FORMATION BECAUSE THEY WERE DRILLED MORE THAN 20 FEET INTO THE ONONDAGA AND ARE THUS PROPERLY CLASSIFIED AS DEEP WELLS.

The factual situation being addressed is a narrow one. This appeal only concerns wells *completed* in a formation(s) above the Onondaga formation[2] that had a drill shaft *drilled* more than twenty feet into the Onondaga formation. Whether the Oil and Gas Conservation Commission has jurisdiction to grant special field rules for misfit wells depends upon the construction of the applicable statutes. The court's duty in that regard is clear. "[I]n deciding the meaning of a statutory provision, '[w]e look first to the statute's language. If the text, given

[2] The issue is likely to arise only in wells completed in the Marcellus Shale formation, which sits atop the Onondaga Group formations.

its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.'" *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). *See also* Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

A shallow well is statutorily defined as:

> Any gas well drilled <u>and</u> completed in a formation above the top of the uppermost member of the "Onondaga Group." Provided, that in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, *not in excess of twenty feet*, in order to allow for logging and completion operations, but in no event may the 'Onondaga Group' formation be otherwise *produced, perforated or stimulated* in any manner.

(emphasis added). W.Va. Code § 22C-9-2(a)(11). [3]

A "deep well" is:

> "any well other than a shallow well, drilled <u>and</u> completed in a formation at or below the top of the uppermost member of the 'Onondaga Group."

W.Va. Code § 22C-9-2(a)(12) (emphasis added).

Petitioners submit that the use of the conjunctive "and" means just that: a well must satisfy both requirements by being drilled *and* completed above the Onondaga in order to be a

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[3] As Petitioner notes, there are three statutes defining deep wells and shallow wells – thankfully all identically. *See also* W.Va. Code §§ 22-6-1 (g), (r), 22C-8-2( ), (8), and 22C-9-2(a)( ), (12).

shallow well. The argument fails to adequately explain W. Va. Code § 22C-9-2(b), which gives the Commission jurisdiction over misfit wells.[4] That statute provides that:

> "Unless the context clearly indicates otherwise, the use of the word 'and' and the word 'or' shall be interchangeable, as, for example, 'oil and gas' shall mean oil or gas or both.

Accordingly, the statutes are appropriately read by the Commission to say "drilled or completed" because the context does not clearly indicate otherwise. In addition, the focus on "and" fails to recognize that the proviso – "Provided, that in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, *not in excess of twenty feet,...*" – acts as a limitation on the words "drilled and completed." In other words, the fact that the well penetrates the Onondaga more than 20 feet trumps the "and completed" language. It is "drilling in excess of 20 feet" that controls over the "drilled and completed." The logical sequence of the inquiry is

(1) was the well drilled into the Onondaga formation?

  a. If yes, see (3) below. If no, then shallow well.

(2) Was the well completed in the Onondaga formation?

  a. If yes, then deep well. If no, see (3) below.

(3) Was the well drilled more than 20 feet into the Onondaga?

  a. If no, shallow well. If yes, deep well.

All parties agree that the law requires the court to construe the statute in the context of other laws and the legislative intent. It is the duty of the court to avoid a construction of a statute that leads to inconsistent results or is in conflict with another statute. *Expedited Transp. Systems, Inc. v. Vieweg*, 207 W. Va. 90, 529 S.E.2d 110 (2000); *Ebbert v. Tucker*, 123 W. Va. 385, 15 S.E.2d 583 (1941). The Commission's specific grant of authority is to regulate the spacing of

[4] As noted below, this provision does ***not*** appear in the other provisions of the Code defining deep wells and shallow wells.

deep wells and to make and enforce regulations to prevent waste. W. Va. Code § 22C-9-4(e). It is beyond reasonable dispute that the Commission is doing just that in connection with its grant of special field rules for misfit wells.

Even if the statute is capable of two constructions, the interpretation by the Commission should be adopted because it does no harm and preserves the rights of everyone to participate and have their day in court. Wherever a statute is capable of two constructions, one of which would work a manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter. *Lawson v. County Commission*, 199 W.Va. 77, 483 S.E.2d 77 (1996). This is because there is a presumption against the legislature enacting unjust statutes. *Id.* The testimony presented in this proceeding shows the necessity of drilling more than 20 feet into the Onondaga in order to accommodate modern logging techniques and equipment. Contrary to the assertions of Petitioners, the Office of Oil and Gas does not have the authority to waive the requirements of a statute. It cannot grant a waiver to permit gas operators to drill more than 20 feet into the Onondaga. The Commission can, however, in appropriate circumstances grant waivers of the mandatory spacing requirements to permit the rational development of oil and gas properties and accommodate the technological needs of producers. The testimony shows all of the problems of trying to stay within a 20-foot rathole (e.g., logging string is 40 feet long which will not fit in a 20-foot hole; the danger of the well shaft caving in due to multiple runs in the hole; additional costs associated with multiple runs into the hole). The Petitioners' interpretation thus does great harm to gas operators by taking away any mechanism to obtain authority on a broad basis to drill a deeper rathole for Marcellus wells.

Moreover, contrary to the alarmists, the construction of the statute by the Commission does not harm Petitioners. The Petitioners have ample opportunity to object (twice, in fact, as

noted in section II below) and to assert their rights – just as they did in this case. The respondents in all cases acceded to the demands of Petitioners to abide by the spacing requirements applicable to shallow wells.

Finally, the decision by the Commission is entitled to great weight in construing the statutes. The construction of a statute by the person charged with the duty of executing the same, such as the Commission in this matter, is accorded great weight by the courts. *Pennsylvania & W. Va. Supply Corp. v. Rose*, 179 W. Va. 317, 322, 368 S.E.2d 101, 106 (1988); *Princeton Comm. Hospital v. State Health Planning, etc.*, 174 W. Va. 558, 564, 328 S.E.2d 164, 171 (1985) ("[A]n agency's determination of matters within its area of expertise is entitled to substantial weight."); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (stating that an agency's "rulings, interpretations and opinions" are not controlling upon the courts, but "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); *see also In re Family Medical Imaging v. West Virginia Health Care Auth.*, 218 W. Va. 146, 624 S.E.2d 493 (2005) (citing with apparent approval Justice Starcher's concurring opinion in *Cookman Realty Group v. Taylor*, 211 W. Va. 407, 566 S.E.2d 294 (2002) ("The agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance.").[5]

For all the foregoing reasons, the Court should deny the appeal of the Commission's orders.

[5] As the Court in *Taylor* stated, "The weight that must be accorded an administrative judgment in a particular case will depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control." *Id.*

II. THE STATUTORY NOTICE REQUIREMENTS COMPORT WITH DUE PROCESS REQUIREMENTS.

Petitioner argues that due process rights were violated because of lack of notice. Quest observes that the notices of hearing on petitions for special field rules and other agency proceedings were published by the Secretary of State's office in the State Register and that Petitioners could subscribe to the publication or view it on online. *See* http://www.wvsos.org/adlaw/register/register.htm. Quest notes further that a coal owner or operator still gets notice by registered or certified mail of any individual well being drilled on property where the coal owner has an interest and can raise any objections at that time. *See* W. Va. Code § 22-6-12.

Notices of state agency hearings are published in the State Register, just as federal agency notices are published in the Federal Register. Petitioner's due process arguments have been considered and rejected by federal courts. For example, one court stated that:

> Petitioners' final claim is that by virtue of the NGA and the Due Process Clause, they were entitled to personal notice of the pendency of the FERC proceedings once TN Gas proposed to route the pipeline across their property. We categorically reject petitioners' interpretation of the NGA. Although the NGA provides that upon FERC's receipt of an application for a certificate of public convenience and necessity, "notice thereof shall be served upon such interested parties," 15 U.S.C. § 717f(d), petitioners conveniently overlook the very next phrase in the statute, "in such manner as the Commission shall, by regulation, require." *Id.* Pursuant to section 717f(d), FERC has issued a regulation stating that "[n]otice of each application filed ... will be published in the Federal Register and copies of such notice mailed to States affected thereby." 18 C.F.R. § 157.9 (1992). FERC did exactly that in this case, thereby presumptively giving notice of the FERC proceedings regarding TN Gas's application "to all persons residing within the States of the Union and the District of Columbia," 44 U.S.C. § 1508 (1988); *see also* 44 U.S.C. § 1507 (1988), so there was no violation of the NGA.

Moreau v. F.E.R.C., 982 F.2d 556, 568-569 (D.C. Cir. 1993). As another court observed,

> "Constitutional due process requires that notice be reasonably calculated to inform parties of proceedings that may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson,* 352 U.S. 112, 115, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956). Publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice. *Camp v. United States Bureau of Land Mgmt.,* 183 F.3d 1141, 1145 (9th Cir.1999); *see also* 44 U.S.C. § 1507 (providing that *Federal Register* publication generally "is sufficient to give notice of the contents of the document to a person subject to or affected by it").

State of California ex rel. Lockyer v. F.E.R.C., 329 F.3d 700, 707 (9th Cir. 2003). Similarly, another tribunal concluded that "We conclude that even if the repeated public notice in the Federal Register did not provide actual notice to the Community, FERC was not required to mail a special notice to the Community." Covelo Indian Community v. F.E.R.C., 895 F.2d 581, 586 (9th Cir.1990).

There is no legal distinction that can be made between the Federal Register and the State Register. Both provide legally sufficient notice.

III. WV SORO'S BRIEF SHOULD BE DISREGARDED

WV SORO raises new issues not asserted at the agency level below. Moreover, the issues are not the same as those asserted by the Petitioners. As a mere intervenor (at best, since there has never been any showing at all that WV SORO or any of its members has any real interest or stake in this proceeding) or as an amicus, WV SORO is limited to the issues raised in the appeal by the Petitioners. WV SORO was not even a party to any of the proceedings below. WV SORO now has the temerity to not even address the issues raised in the appeal, choosing instead to ramble off in another direction and raise its own, brand new issues. What WV SORO fails to even recognize is that the real parties in interest -- those who appeared at the hearings and

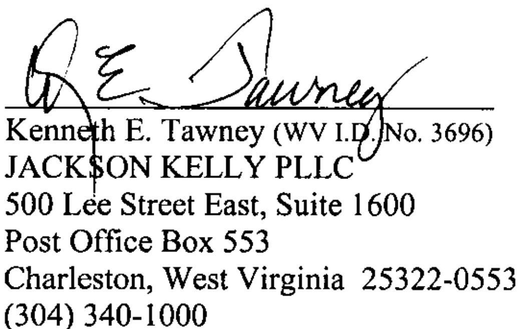
participated – resolved the horizontal spacing issue by stipulations entered on the record, essentially agreeing to spacing not less than 1,500 feet in coal-producing regions. For these reasons, WV SORO's filing should be disregarded by the court as being beyond the scope of issues to be considered in this appeal.

IV. CONCLUSION

For the reasons herein set forth, Quest asks that the court determine that the Commission properly exercised jurisdiction over misfit wells, properly noticed the hearing on the request for special field rules governing such wells, and, based upon the evidence before it, properly granted special field rules.

QUEST EASTERN RESOURCE LLC,
successor in interest to PetroEdge Resources (WV), LLC

By Counsel



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WEST VIRGINIA OIL & GAS CONSERVATION)
COMMISSION, et al.,)
)
Respondents.)

CERTIFICATE OF SERVICE

I, Kenneth E. Tawney, hereby certify that I served the foregoing **REPLY BRIEF OF QUEST EASTERN RESOURCE LLC, SUCCESSOR IN INTEREST TO PETROEDGE RESOURCES (WV), LLC** upon counsel of record, by depositing a true and exact copy of the same in the regular course of the United States mail, postage prepaid, on this the 14th day of July, 2009, addressed as follows:

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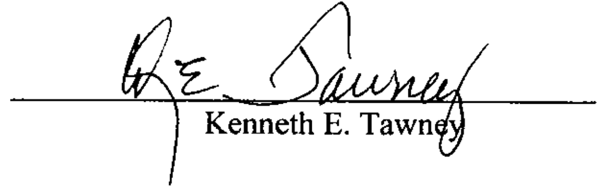

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