IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

BLUE EAGLE LAND, LLC, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	**Case No.: 08-C-171-M**
	)	
WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, *et al.*,	)	
	)	
	)	
Respondents.	)	

PETITIONERS' REPLY BRIEF

NOW COME the Petitioners, by and through their Counsel, Nicholas S. Preservati of Preservati Law Offices, and for their REPLY BRIEF, state as follows:

I. STANDARD OF REVIEW

An administrative agency is but a creature of statute, and as such, it has no greater authority than that conferred under the governing statute. *Monongahela Power Company v. DEP*, 211 W.Va. 619, 567 S.E.2d 629 (2002). It cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power. *Id*.

Subject matter jurisdiction cannot be conferred by agreement, consent, or waiver by the parties, either explicitly or implicitly. *West Virginia v. Tommy Y*, 219 W. Va. 530; 637 S.E.2d 628 (2006). Thus, whether an administrative agency or a court has subject matter jurisdiction over an issue is a question of law. *Snider v. Snider*, 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001). As such, this Court's standard of review over the legal question of the Commission's

subject matter jurisdiction is *de novo*. Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

II. PETITIONERS' APPEAL WAS TIMELY FILED.

EAEC and Chesapeake's argument that Petitioners' appeal was not timely filed is absurd. This matter was originally heard by the West Virginia Supreme Court on Petitioners' Petition for Writ of Prohibition. In its order, the West Virginia Supreme Court refused to address the case on its merits and dismissed it from the Court's docket. In doing so, it specifically granted Petitioners leave to file an appeal of the Commissions orders in circuit court, "within thirty days of the issuance of the mandate in the instant case, ***which shall be deemed to be a timely appeal***." Blue Eagle, et al. v. Conservation Commission, et al., 664 S.E.2d 683, 686 (2008) (emphasis added). The Petitioners filed their appeal within thirty (30) days of the issuance of the mandate by the Supreme Court. Therefore, per the express language of the Supreme Court's order, this appeal is timely.

III. TO BE A DEEP WELL, A WELL MUST BE DRILLED AND COMPLETED IN OR BELOW THE ONONDAGA FORMATION.

A. *Every Statutory Definition of a "Deep Well" Requires the Well to be Drilled AND Completed in or below the Onondaga.*

The primary issue in this appeal is whether a well must be drilled *and* completed in or below the Onondaga formation for it to be a deep well. To begin, there are three separate, but identical, statutes defining a "deep" well. The first is located under the Office of Oil and Gas ("OOG") section of the State Code at §22-6-1(g). The second one is located under the Shallow Gas Well Review

Board section of the State Code at §22C-8-2(8). The final one is located under the Conservation Commission ("Commission") section of the State Code at §22C-9-2(a)(12). Each of the three definitions read as follows:

> "Deep well" means any well other than a shallow well, *drilled and completed* in a formation at or below the top of the uppermost member of the "Onondaga Group."

(emphasis added). Therefore, pursuant to the OOG definitions, the Shallow Gas Well Review Board's definitions, and the Commission's definitions, a well must be both drilled *and* completed in or below the Onondaga in order to be a deep well. This part of the analysis cannot be disputed. The express language of all three definitions is as clear as it is definitive, to be a "deep" well, the well must be drilled *and* completed in or below the Onondaga.

B. *Section 22C-9-2(a)(12) does not apply in this case.*

Respondents cannot deny that the express language of all three of the "deep" well definitions require that the well be drilled *and* completed in or below the Onondaga. In order to overcome this requirement, the Respondents simply rely upon §22C-9-2(a)(12), which reads:

> 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.

Respondents' argument fails for two reasons. First, this "and/or" provision can only be found in the Commission's set of definitions. It does not exist in the OOG'S definitions or the Shallow Gas Well Review Board's definitions. This creates a conflict that is absolutely fatal to Respondents' argument.

For example, the Commission only grants special field rules and approves pooling or drilling units. It does not address objections to individual deep well permit applications. Therefore, in the event a coal operator objects to an individual deep well permit application, it is the Director of the OOG that entertains that objection, not the Commission. This is a very important distinction.

In this case, the Respondent gas operators have sought special field rules from the Commission for wells that they claim to be deep wells. The Commission determined that the proposed wells were deep wells because they would be drilled *or* completed in, or below, the Onondaga. The Commission made this determination by relying upon the "and/or" provision of §22C-9-2(a)(12). As a result, the Commission granted several of the Respondents' applications for special field rules.

Now that the special field rules have been approved, the Respondent gas operators will begin filing individual deep well permit applications for proposed wells within the areas covered by the special field rules. In the event a coal operator objects to one of these individual deep well permit applications, the objection will be forwarded to the Director of the OOG for resolution.

The problem arises from the fact that the Director is not bound by the Commission's definition of a deep well. He is bound by the OOG'S deep well definition found in §22-6-1(g). Pursuant to that definition, a "deep well" is a well drilled *and* completed in, or below, the Onondaga. However, unlike the Commission's set of definitions, there is no reciprocal "and/or" provision in the

OOG'S definitions. Therefore, under the OOG'S definition of a deep well, "and" and "or" are **not** interchangeable. The well must be drilled *and* completed in, or below, the Onondaga or it is not a deep well.

Because these wells will not be drilled *and* completed in, or below, the Onondaga, they will not qualify as deep wells under the OOG'S definitions. Since they will not meet the OOG'S definition of deep wells, the Director will not have jurisdiction to either entertain the coal operator's objections to the well permits or to issue the actual well permits. The end result of Respondents' argument is that the Respondent gas operators will have special field rules issued for wells that they cannot even permit as deep wells.

Secondly, even if the provision were considered, the context of the "deep" well definition clearly indicates that "or" should not be used. That is because the word "or" is a disjunctive particle that allows one to choose between several persons, things, or situations. The word "and" is a conjunctive particle that does not allow one to choose between several options, but instead, requires a combination of all persons, things or situations.

Thus, in order for the word "or" to be appropriately used, there must be several distinct choices from which to choose. The fatal flaw with the Respondents' argument is that the terms "drilled" and "completed" are not mutually exclusive, and as such, there are not two alternatives to choose from. For example, an operator can drill to a formation without completing it. However, the operator cannot complete a formation without drilling to it.

Therefore, it does not make sense to say a deep well is a well drilled *or* completed in a deep formation because a well cannot be completed in a deep formation without first being drilled. Thus, the Respondents' interpretation is erroneous and illogical because in the context of the deep well definition, the use of the word "or" does not provide one with the ability to choose between several alternatives. Since the context indicates otherwise, the word "and" and the word "or" are not interchangeable in regards to the deep well definition.

Good old common sense exposes the error in the Respondents' position. The Legislature deemed it necessary to have deep well production regulated by a different agency than the agency that regulated shallow well production. This is because the Legislature determined as a matter of public policy that "oil and gas deposits in such *shallow* sands or strata have geological and other characteristics *different* than those found in *deeper* formations." W.Va. Code §22C-9-1. (emphasis added).

In other words, the Legislature decided that wells producing different types of gas should be regulated differently. That is the entire reason the Onondaga was chosen as the dividing line between shallow wells and deep wells. Gas produced from formations above the Onondaga will not have the same levels of caustic sulfuric acid that is contained in gas produced from the Onondaga and below. Gas produced from the Onondaga or below will destroy coal seams to a much greater extent than will gas from shallower formations.

It is these differences in the types of gas produced that warranted the creation of the Conservation Commission and the Legislature's differentiation between "shallow wells" and "deep wells." Thus, one cannot even begin to ascertain the meaning or context of the "deep well" definition without considering the type of gas such a "deep" well would produce.

Oddly, the Respondents' choose to ignore this factor. Instead, their sole focus is the depth of the borehole, irrespective of the type of gas produced inside it. This faulty logic results in a ridiculous and unintended outcome. For example, consider two separate wells, "Well A" and "Well B." Both wells will produce gas from only the Marcellus formation, which is a shallow formation. The only difference between the wells is that Well A will be drilled twenty feet (20') into the Onondaga, while Well B will be drilled twenty-one feet (21') into the Onondaga. The two wells will produce the exact same amount of gas and the exact same type of gas from the exact same gas formation.

Under the Respondents' theory, Well A is a shallow well, while Well B is a deep well. As a result, the two wells will be subject to different regulations. For example, Well A can be drilled within 200 feet of the lease line, while Well B can only be drilled within 400 feet of the lease line. The affected surface owner cannot object to Well A, but can object to Well B. Well A will not be subject to forced pooling, while Well B will be. Well A will be subject to 1,500 foot spacing, while, absent special field rules, Well B will be subject to 3,000 foot spacing. Well A will not need a comprehensive safety plan, while Well B will. Well A will not need sulfuric acid detectors; Well B will.

These two wells will be drilled and regulated under completely different sets of rules. The coal owners, surface owners, and adjoining gas owners for Well A will have completely different rights than the coal owners, surface owners, and adjoining gas owners for Well B. Everything about these two wells will be different for the simple reason that Well B was drilled one foot (1') deeper than Well A. That is the only difference. Such a ridiculous result was not envisioned, nor intended by the Legislature. That is why the Legislature requires a deep well to not only be drilled into the Onondaga, but to also be completed into the Onondaga.

Under the Petitioners' theory, Well A and Well B would both be shallow wells subject to the same regulations. The coal owners, surface owners, and adjoining gas owners for both wells would have identical rights. The only difference would be that the gas operator for Well B would be fined by the OOG for violating the statute and drilling too deep into the Onondaga. This is the logical, common sense solution to this problem.

Finally, the Commission raises a non-existent concern in an attempt to sway this Court. The Commission states that, "If the deep well definition requires both drilling and completion in the Onondaga, then there would be no limitation in how far a well is drilled into the Onondaga so long as it is not completed." (Commission Brief, page 8).

This comment makes absolutely no sense because there is a clear limitation on how deep the well can be drilled. If it is not a deep well, then it is a shallow well, which cannot be drilled deeper than twenty feet into the Onondaga.

If it is drilled deeper, then the Director of the OGG can issue a fine against the offending gas operator.

IV. CONCLUSION

WHEREFORE, the Petitioners respectfully request that this honorable Court grant its Petition for Appeal and any other relief it deems appropriate.

Respectfully Submitted,

PETITIONERS,
By Counsel.

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CERTIFICATE OF SERVICE

I, Nicholas S. Preservati, do hereby certify that I have served a true and exact copy of the foregoing **PETITIONERS' REPLY BRIEF** upon all counsel of record by mail on the 28th day of July, 2009, addressed as follows:

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