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## The Pennsylvania Environmental Hearing Board Clouds the Waters: Should Well Operators Appeal PADEP Determinations that Oil and Gas Activities Have Affected Water Supplies?

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A recent Pennsylvania Environmental Hearing Board (“EHB”) decision may create uncertainty as to whether oil and gas well operators can or should appeal determination letters issued by the Department of Environmental Protection (“PADEP”), under section 3218 of Pennsylvania’s newly codified statute relating to oil and gas development,<sup>1</sup> when PADEP has determined that oil and gas operations have impacted a water supply. In *Kiskadden v. DEP*,<sup>2</sup> the EHB held that a *landowner* may appeal a PADEP determination letter indicating that gas well activities did *not* affect the landowner’s water supply. This decision is of interest to well operators because the EHB has on multiple occasions dismissed appeals brought by operators on grounds that *operators* may *not* appeal PADEP determination letters reflecting PADEP findings that oil and gas activities did affect public or private water supplies.

Section 3218 (former section 208 of the Oil and Gas Act) sets forth the procedure for landowners and water purveyors to allege pollution or diminution of water supplies as the result of drilling or operation of oil or gas wells.<sup>3</sup> Under section 3218, a landowner or water purveyor may allege to PADEP that a water supply has been affected by an oil or gas well and request a PADEP investigation. Upon notice, PADEP is obligated to investigate the claim and then make a determination within 45 days of notification. If PADEP finds that pollution or diminution was caused by an oil or gas well, the agency must issue an order as necessary to ensure compliance with the statute’s requirements for restoration or replacement of the water supply.

This procedure is substantially the same as under section 208 of the prior Oil and Gas Act. In sum, it requires PADEP to perform up to three key steps upon a landowner’s notice: (1) undertake an investigation, (2) make a determination, and (3) issue an enforcement order against a well operator if warranted and necessary. The question raised in *Kiskadden* and previous cases dealing with section 208 was whether the second step – a determination letter – is an appealable action. Generally, under

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<sup>1</sup> The provisions relating to oil and gas development were adopted as part of section 1 of Act 13 of 2012, P.L. 87, and are codified as 58 Pa. C.S. §§ 3201-3274.

<sup>2</sup> EHB Docket No. 2011-149-R (Pa. EHB May 16, 2012).

<sup>3</sup> 58 Pa. C.S. § 3218; 25 Pa. Code § 78.51.

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the Environmental Hearing Board Act, a PADEP action is appealable if it is final and adversely affects a person's rights.<sup>4</sup>

The EHB has dismissed appeals on several prior occasions on grounds that *operators* cannot appeal a PADEP determination letter which states that oil and gas operations affected a water supply. For example, exactly one year before the recent *Kiskadden* decision, the EHB dismissed a well operator's appeal on grounds that the PADEP letter pursuant to section 208 was not an appealable "action" under the Environmental Hearing Board Act or "adjudication" under the Administrative Agency Law.<sup>5</sup> Although the EHB order did not elaborate on its reasoning, PADEP's motion to dismiss took the position that the determination letter did not require the operator "to do something that will change the status quo" or contain a decision "affecting" the operator that PADEP "manifested or carried out."<sup>6</sup> In other words, according to PADEP, the letter did not institute an enforcement action against the operator or require the operator to do anything.

In *Kiskadden*, a landowner filed a complaint with PADEP under section 208 of the previous Oil and Gas Act,<sup>7</sup> alleging that his residential water supply had been polluted by oil and gas activities. As required by the Act, PADEP investigated the complaint by collecting water samples, and the well operator also collected samples. The samples indicated the presence of various substances in the water supply, including dissolved methane, chloroform, butyl alcohol, acetone, and elevated levels of sodium and total dissolved solids. By letter, however, PADEP informed the landowner that these constituents were not present as a result of any oil and gas activity.

The landowner filed an appeal of PADEP's determination letter with the EHB. PADEP moved to dismiss the appeal on grounds that the letter was not an appealable action. Thus, the issue in *Kiskadden* was whether PADEP's determination letter – which was unfavorable to the *landowner*, as opposed to an *operator* – was appealable.

PADEP's letter specifically stated that any aggrieved person may appeal PADEP's action pursuant to the Environmental Hearing Board Act and the Administrative Agency Law.<sup>8</sup> But the EHB upheld the well-established principle that such language, or the absence of such language, does not alone control whether a PADEP action is appealable. Instead, the EHB explained that various factors control the question of appealability, which is determined on a case-by-case basis.<sup>9</sup>

The EHB found it significant that section 3218 (like former section 208, which applied in the case) imposes *mandatory* duties on PADEP. These include the affirmative obligations to (1) investigate water pollution and diminution complaints, (2) make determinations with respect to those complaints, and (3) issue orders necessary to ensure compliance with the requirements for replacement or

<sup>4</sup> See 35 P.S. § 7514. An "action" is "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2.

<sup>5</sup> *Chesapeake Appalachia, L.L.C. v. DEP*, EHB Docket No. 2011-006-L (Pa. EHB May 16, 2011).

<sup>6</sup> PADEP's Motion to Dismiss, *Chesapeake Appalachia*, EHB Docket No. 2011-006-L (Apr. 22, 2011).

<sup>7</sup> 58 P.S. § 601.208, *repealed and replaced by* 58 Pa. C.S. § 3218.

<sup>8</sup> 2 Pa. C.S. §§ 501-508.

<sup>9</sup> The factors include "the specific wording of the communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide." *Kiskadden*, EHB Docket No. 2011-149-R, at 4 (citing *Jackson v. DEP*, EHB Docket No. 2009-073-M (Pa. EHB Apr. 6, 2010)).

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restoration of water supplies affected by oil and gas activities. In contrast, the EHB distinguished situations in the mining context where PADEP's authority to order restoration or replacement of water supplies is "purely discretionary" and, thus, nonappealable.<sup>10</sup>

The EHB likened the section 208 complaint to a mine subsidence claim, which requires a decision by PADEP "one way or another."<sup>11</sup> The EHB explained that PADEP does not enjoy prosecutorial discretion immunity from EHB review if denial of a claim "clearly and adversely" affects property rights.<sup>12</sup> The EHB held that PADEP's determination that the landowner's water supply was *not* impacted by gas well activities "clearly and adversely affected [the landowner's] property rights" and, accordingly, the determination letter was appealable.

The *Kiskadden* decision might be read as inconsistent with the prior EHB decisions that dismissed operators' appeals of PADEP determination letters on grounds that the letters are not appealable actions. Alternatively, the EHB may recognize a meaningful distinction between the effect of a determination letter on the rights of a landowner, versus the rights of an operator, which allows it to reconcile its rulings.

As noted in *Kiskadden*, a determination by PADEP that oil and gas operations have not impacted a landowner's water supply "clearly and adversely" affects the landowner's rights. In the absence of an appeal, there is no further recourse for the landowner under the statute and no additional action to be taken by PADEP. With respect to an operator, however, PADEP's determination of impact to a water supply is not the final step in the enforcement process. If the operator does not voluntarily restore or replace the water supply, PADEP is obligated to issue an order directing restoration or replacement of the supply. Such an order clearly would be appealable. The EHB's prior rulings, however, suggest that the underlying determination letter is not appealable by the operator independently of the subsequent enforcement order.

Under this construct, as to an operator, a PADEP determination letter may be said to "merely list the violations observed, advise of the possibility of future enforcement action, or inform the [operator] of the procedures necessary to achieve compliance, [which] are not appealable actions."<sup>13</sup> In other words, a determination of no impact to a water supply is "final" as to the *landowner* according to *Kiskadden*, but a determination of impact would not be final as to an *operator* because PADEP must take an enforcement action against the operator as the last step in the statutory scheme.

In *Kiskadden*, the EHB made no attempt to reconcile its ruling with its prior rulings dismissing operator appeals of section 208 determination letters. At minimum, therefore, *Kiskadden* clouds the EHB's prior rulings. This suggests that operators should consider taking appeals of determination letters, when warranted, to avoid any claim that, by failing to take an appeal, PADEP's determination becomes administratively final and unchallengeable. The question of whether the EHB will ultimately allow operators to maintain such appeals, or whether the EHB will instead seek to harmonize *Kiskadden* with its prior rulings dismissing appeals by operators, remains open for decision on another day.

<sup>10</sup> *Id.* at 6-7 (distinguishing *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005)).

<sup>11</sup> *Id.* at 7 (describing the procedure to process mine subsidence claims under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §§ 1406.1-1406.21).

<sup>12</sup> *Id.* (quoting *Love v. DEP*, EHB Docket No. 2010-031-L (Pa. EHB July 12, 2010)).

<sup>13</sup> *Beaver v. DEP*, EHB Docket No. 2002-096-K, at 8-9 (Pa. EHB Aug. 8, 2002).

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