IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No.: 1167 CD 2015

LOREN KISKADDEN, Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES, Respondents.

APPLICATION TO VACATE AND REMAND TO PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

Court Below:	Commonwealth of Pennsylvania Environmental Hearing Board
Date of Order Appealed From:	June 12, 2015
Order Type:	Adjudication
Lower Court Docket No.:	EHB Docket No. 2011-149-R
Filed on Behalf of:	Loren Kiskadden, Petitioner
Counsel of Record:	John M. Smith, Esquire Pa. I.D. No. 75663 Kendra L. Smith, Esq. Pa. I.D. 77217 SMITH BUTZ, LLC 125 Technology Drive, Suite 202 Bailey Center I, Southpointe Canonsburg, PA 15317 Phone: (724) 745-5121 *Counsel for Petitioner/Appellant*

COMMONWEALTH COURT OF PENNSYLVANIA

LOREN KISKADDEN Petitioner, vs. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC. Respondents.	)	**Docket No.** 1167 CD 2015

APPLICATION TO VACATE AND REMAND TO PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

Loren Kiskadden ("Mr. Kiskadden" or "Petitioner"), through counsel, Smith Butz, LLC files this Application to Vacate and Remand to Pennsylvania Environmental Hearing Board (the "Application") pursuant to Pennsylvania Rule of Appellate Procedure 123. In support of this Application, Mr. Kiskadden states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. The within appeal concerns a final Adjudication of the Pennsylvania Environmental Hearing Board (the "Board") relative to Mr. Kiskadden's claim of water contamination as a result of documented nearby leaks, spills, and releases from

up-gradient natural gas drilling operations.

2. Mr. Kiskadden, Petitioner herein, lives in Amwell, Township, Washington County, down-gradient and southwest approximately 2800 feet from a leaking natural gas drilling operation known as the Yeager Site, including the Yeager Impoundment and Yeager Drill Cuttings Pit.

3. Mr. Kiskadden's property is serviced by a water well that pulls from groundwater downhill from the Yeager Site. Prior to the installation of the Yeager Site, Mr. Kiskadden and various family members lived on this property for approximately 30 to 40 years without incident, complaint or any other indication of problems with the water.

4. On or about June 3, 2011, Mr. Kiskadden's drinking water turned grey and black, and came out of his hose foaming, bubbling, and containing large visible quantities of sediment. Additionally, Mr. Kiskadden's water had a terrible smell of rotten eggs. As a result of the foregoing, Mr. Kiskadden contacted the Pennsylvania Department of Environmental Protection (the "Department") and Range Resources-Appalachia, LLC ("Range") about the degradation of his water quality.

5. In response to this complaint, both the Department and Range collected water samples from Mr. Kiskadden's property on several different occasions.

6. On September 9, 2011, the Department issued a determination regarding its purported investigation of Mr. Kiskadden's water contamination complaint (the

"Determination"). In its Determination, the Department concluded that the problems with Mr. Kiskadden's water were not caused by gas-well related activities.[1] The Department did, however, determine that Mr. Kiskadden's drinking water supply was polluted and not suitable for human consumption.

7. Mr. Kiskadden filed a timely appeal with the Board on October 7, 2011 in objection to the Department's Determination. Range was joined in the appeal before the Board as Permittee of the Yeager Site, the location of the natural gas drilling operations.

8. The discovery process before the Board in this matter was lengthy. Mr. Kiskadden served multiple sets of Interrogatories, Requests for Production of Documents and Requests for Admissions upon both Range as well as the Department.[2]

9. During the discovery period, Mr. Kiskadden explicitly served Range with requests to identify any and all products used at the Yeager Site and the chemical

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[1] The Department made its Determination without reviewing all of the data available from Mr. Kiskadden's water sampling in addition to failing to review all available data from testing performed at and around the Yeager Site. Mr. Kiskadden was never informed by Range or the Department that multiple spills and releases occurred prior to Mr. Kiskadden's water quality complaint. Many of these spills and releases contained the same parameters detected in Mr. Kiskadden's drinking water.

[2] Mr. Kiskadden is involved in a parallel case currently proceeding before the Washington County Court of Common Pleas, discussed in further detail below. Because of this parallel case proceeding concurrently with his appeal before the Board, more expansive discovery, including depositions, was sought from Range that was not similarly limited by the issues before the Board. Discovery and the receipt of information remains ongoing.

components within each of those products. *See*, Appellant's First Request for the Production of Documents, selected pages attached hereto as **Exhibit 1**; *see also*, Appellant's First Set of Interrogatories, selected pages attached hereto as **Exhibit 2**. Additionally, Mr. Kiskadden requested that Range produce and identify all proprietary chemicals used in drilling operations at the Yeager Site. *Id.*

10. Subsequently, at the direction of the Board, counsel for Mr. Kiskadden and counsel for Range met in-person for a "meet and confer" session in order to, in part, resolve Mr. Kiskadden's discovery disputes with Range's lack of production relative to Mr. Kiskadden's request for identification of all products and chemicals. This meeting took place on December 17, 2012.

11. At the "meet and confer" session, Range's counsel explained that Range itself would not likely have the information that Mr. Kiskadden was seeking, but it would use its "best efforts" to obtain from its third-party vendors the information regarding the chemical composition of the products used at the Yeager Site. *See*, Transcript of December 17, 2012 "Meet and Confer," selected pages attached hereto as **Exhibit 5**. As part of these efforts, Range sent a number of letters out to various (but not all of the) product manufacturers requesting that it provide any information regarding the composition of its product that was not already included on a product's

Material Safety Data Sheet ("MSDS"). These half-hearted efforts proved unavailing.[3]

12. On March 28, 2013, Mr. Kiskadden filed a Motion to Compel as a result of Range's failure to fully identify all products that were used at the Yeager Site, including all chemicals within those products. *See*, Appellant's Motion to Renew Motion to Compel, Pa. EHB Docket No. 157. Upon disposition of the Motion to Compel, the Board ordered Range to disclose all products and all chemicals within the products used at the Yeager Site. The contents of the Board's July 19, 2013 Order is as follows (the "July 19th Order"):

> AND NOW, this 19th day of July, 2013, after review of Appellant's Motion to Compel Discovery Responses from Permittee and Appellant's Motion to Renew Motion to Compel Against Permittee, Permittee's Responses, and following Oral Argument before the Pennsylvania Environmental Hearing Board, it is ordered as follows:
> . . .
> 9) Appellant's Motion to Renew Motion to Compel is **granted**. On or before **August 20, 2013**, Permittee shall provide Appellant with a list identifying any and all proprietary chemicals comprising each and every product identified by Permittee **as used** at the Yeager Site. In addition, Permittee will provide Appellant with a list of all chemicals for each Material Safety Data Sheet of the products Permittee earlier identified as used at the Yeager Site that lacked full information regarding all of the chemicals and components of those particular products.

See, July 19th Order, attached hereto as **Exhibit 7**. (emphasis added).

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[3] The Board expressly stated: "We believe that Range put forth a minimum of effort into this endeavor. A company with the status and size of Range could have exercised much more influence with its suppliers to obtain information about the chemical composition of products its uses at its operation." Along the same lines, the Board also stated: "We find it particularly troubling that neither Range nor the Department of Environmental Protection is fully aware of the chemical composition of products being used during gas drilling and hydraulic fracturing operations." *See*, June 10, 2014 Opinion and Order, attached hereto as **Exhibit 6**.

13. Range failed to comply with the Board's July 19th Order by again failing to produce information regarding the chemical make-up of products used at the Yeager Site. As a result, Mr. Kiskadden filed a Motion for Contempt and for Sanctions in the Form of an Adverse Inference (the "Adverse Inference Motion"). *See*, Appellant's Motion for Contempt and for Sanctions in the Form of an Adverse Inference, Pa. EHB Docket No. 204.

14. In the Adverse Inference Motion, Mr. Kiskadden set forth that Range was regularly making representations to Pennsylvania citizens, the Securities & Exchange Commission (SEC) as well as the public at-large that it knew and voluntarily disclosed all of the chemicals contained in hydraulic fracturing products it utilized. *Id.* at ¶¶ 27-29, 51. Yet, Range likewise maintained an inability to disclose the chemical content of all the products used at the Yeager Site when ordered to do so. *Id.* at ¶¶ 7-25.

15. Range had previously informed the public that it knew all of the chemicals it was using in its hydraulic fracturing operations and that it was the first to make such open disclosures. For example, the following pronouncements were made:

> **"Range Resources Spearheading Voluntary Initiative"**
>
> "On July 14, 2010, Range announced its voluntary initiative to disclosure Marcellus Shale hydraulic fracturing additives .... **The decision to disclose the exact chemical composition of the chemical additives used in hydraulic fracturing (fracking), has come about because people are distrustful of the potential damage fracking**

could cause…"

See, Range Resources Spearheading Voluntary Initiative, August 13, 2010, Energyglobal.com, attached hereto as **Exhibit 3.** (emphasis added).

"Natural-Gas Driller to Disclose Chemical Use"

> "Range Resources Corp. says it plans to disclose the chemicals used to hydraulically fracture natural-gas wells in Pennsylvania, confronting rising pressure from environmental groups worried that drilling could contaminate drinking water…In a significant break from past practice, Range says it will begin submitting a detailed list of **all chemicals and additives**, and the volumes, used to fracture each of its gas wells to the state."

See, Natural-Gas Driller to Disclose Chemical Use, July 14, 2010, WSJ.com, attached hereto as **Exhibit 4.** (emphasis added).

16. Moreover, Mr. Kiskadden argued in his Adverse Inference Motion that it was his burden of proving that the constituents in his water supply are attributable to Range's constituents used or released at the Yeager Site during drilling operations. Thus, timely identification of these constituents was important to Mr. Kiskadden's case-in-chief. Specifically, Mr. Kiskadden raised the following arguments:

> Range is the only party in control of the information and should have full, accurate knowledge and information regarding *what it has used and brought onto the Yeager Site*, not only after it has done so, but, more importantly, before it purchases and uses such products and chemical constituents at drill sites in Pennsylvania.
>
> Furthermore, Range is in control of which manufacturers and subcontractors it chooses to purchase chemicals and products from, and failed to collect information regarding the chemical constituents and makeup of products that it purchased from manufacturers and used at the Yeager Site before using such products and chemicals. Range should not be rewarded for its inability to collect complete information

> or mandate full disclosure prior to its placement into the Pennsylvania environment.
>
> *Information regarding the chemicals in Range's products could serve to further establish* that Range's products used at the Yeager Site contaminated Appellant's water and negate a defense by Range and the Department that both are unsure. *As such, if the information were exonerating, it would naturally be in Range's best interest to produce the information*.
>
> Range cannot provide any satisfactory explanation for its failure to identify the products, chemicals and components it utilized at the Yeager Site. As Range places these products, chemicals and components into the Pennsylvania environment during its drilling operations, it is responsible for ascertaining complete information from its manufacturers and subcontractors prior to a product's use.

See, Appellant's Motion for Contempt and for Sanctions in the Form of an Adverse Inference, Pa. EHB Docket No. 204, at ¶¶ 47-50. (emphasis added).

17. In response to Mr. Kiskadden's Adverse Inference Motion, Range explained that: 1) it did not know all of the chemicals in all of the products utilized at the Yeager Site; and 2) it could not obtain that information from the manufacturers it had contacted. *See*, Range's Response to Adverse Inference Motion and Brief in Support, Pa. EHB Docket Nos. 206 & 207. Range's position was obviously inconsistent with its public stance and pronouncements of full knowledge and disclosure of constituents used.

18. Therefore, in an attempt to avoid the possible imposition of an adverse inference, Range informed the Board of its plan to purportedly "reverse engineer" the products used at the Yeager Site in order to determine their chemical composition. *Id.*

at Docket No. 207, ¶ 5. Range engaged in a process of forensic chemistry to attempt to identify the missing chemical constituents in *some* of the products used at the Yeager Site. It was later learned that the failed attempt to reverse engineer was even more futile than earlier thought as some of the proprietary components in selected products were not a single missing chemical but rather an entirely new product – *i.e.*, a "product within the product."

19. Following distribution of the "reverse engineering" report, the Board ordered supplemental briefing from the parties to determine whether Range's endeavors sufficiently addressed the Board's requirements set forth in the July 19th Order.

20. Review of the failed "reverse engineering" report revealed that it left Mr. Kiskadden with little more information than that which he already had. In other words, Range's efforts to "reverse engineer" the products used at the Yeager Site were woefully insufficient. *See*, Appellant's Supplemental Brief in Support of Motion for Adverse Inference, Pa. EHB Docket No. 233. Most of the product information supplied by the report was already available to Mr. Kiskadden through the limited information contained on the products' Material Safety Data Sheets ("MSDS"). *Id.*

21. Based upon the foregoing, on June 10, 2014, almost one (1) year later, the Board imposed a sanction for Range's non-compliance with its July 19, 2013 Order in the form of a rebuttable presumption in response to Mr. Kiskadden's request

for an Adverse Inference and ordered as follows (the "June 10th Order")[4]:

> The Appellant is granted a rebuttable presumption that contaminants present in the Appellant's water supply may have been used at the Yeager site and/or in Range's operations. The Appellant still has the burden of proving a hydrogeologic connection.

See, Exhibit 6.

22. Through the June 10th Order, the Board appropriately determined that the burden to produce information regarding the products and chemicals used at the Yeager Site fell squarely upon Range. The Board stated:

> While we disagree that spoliation has occurred, since Range has not engaged in the destruction or **withholding of evidence**, we do agree that it, as the party that used the products in question, bears some responsibility for producing information regarding the chemical composition of the products. We have determined after extensive argument and briefing that the **Appellant has a right to such information through discovery**, and the party in the best position to obtain this information is Range, the purchaser and user of the products.[5]

See, Exhibit 6. (emphasis added).

23. With this rebuttable presumption in effect, the merits hearing relative to

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[4] Of note, one of the bases for Mr. Kiskadden's Petition for Review before this Honorable Court is the Board's failure to ultimately utilize the rebuttable presumption sanction it ordered in reaching its decision.

[5] The Court of Common Pleas of Washington County entered a similar Order requiring Range to produce this chemical information. Range appealed this Order to the Pennsylvania Superior Court. That appeal was quashed by the Court as it found that the appealed Order did not satisfy the requirements of the collateral order doctrine. In a concurring opinion, the Honorable Judge Lazarus held, "the order does not meet the importance prong because it focuses on **the rather standard issue that the party who caused a product to be used bears the burden of presenting evidence about that product**." *Haney et al. v. Range Resources et al.*, 2015 WL 1812842 (Pa. Super. 2015). (emphasis added).

Mr. Kiskadden's appeal of the Determination was held before the Board from September 22, 2014 through November 19, 2014 with Chief Judge Thomas Renwand presiding. During that time, the hearing ensued for twenty (20) days.

24. During the hearing, the Parties entered into Joint Stipulations in order to obviate the need to elicit testimony from product suppliers relative to certain products used at the Yeager Site, in light of the rebuttable presumption. The anticipated testimony was merely to confirm by the companies the limited information already provided to Mr. Kiskadden about certain products' composition. The Joint Stipulations further identified certain products used at the Yeager Site. Specifically, the following factual stipulations were entered into evidence:

- Joint Stipulation of Facts for Merits Hearing Concerning Universal Well Services, Inc.; and
- Joint Stipulation of Facts for Merits Hearing Concerning Multi-Chem Group, LLC.

25. While these stipulations may have provided a purported acknowledgment of the limited knowledge regarding selected *products* used at the Yeager Site, they did nothing to further elucidate all of the *chemicals and constituents* in the products that may have been used or that were brought to the Yeager Site from other drilling operations.[6]

[6] The Yeager Site hosted an illegal mud processing plant where Range brought in drilling fluids and muds from other drill sites to Yeager. At the hearing, a representative from EAP Industries

26. The record evidence consists of a transcript of testimony that is 4,931 pages and hundreds of exhibits were entered into evidence. Following the hearing before the Board, the parties each filed post-hearing briefs and reply briefs.

27. On June 12, 2015, the Board issued its Adjudication of Mr. Kiskadden's appeal authored by Judge Renwand (the "Adjudication"). *See*, June 12, 2015 Adjudication, attached hereto as **Exhibit 8**. The Board authored a fifty-eight (58) page Opinion and Order that contained a Background, Findings of Fact, Discussion, Conclusions of Law and an Order. The Board provided the following "Synopsis" of its decision:

> The Pennsylvania Environmental Hearing Board finds that the Appellant has not met his burden of proving by a preponderance of the evidence that his water well was impacted by gas drilling operations conducted by Range Resources. Although the Appellant presented extensive evidence of leaks and spill that occurred at Range's site, some of which were not reported to the Department of Environmental Protection in a timely manner, he did not demonstrate by a preponderance of the evidence that

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("EAP") was called to testify. EAP was involved in transporting fluids and muds to the Yeager Drill Cuttings Pit from numerous other drill sites. The EAP representative testified as follows:
Q: And sir, am I correct that when you brought the drill cuttings and/or muds to the Yeager Site, you did not have analytical data as to what you were bringing to the site; do you understand my question?

A: Yes. The answer is yes to your question.

(R. 996a).

Also, the Yeager Site contained a centralized Impoundment that was used to house flowback and produced water from numerous other drill sites. The Department testified that it was unaware of the constituents being transported to the Yeager Site from other Range drill sites. (R. 496a). Of great importance is that the Yeager Drill Cuttings Pit leaked its contents. Additionally, the centralized Yeager Impoundment leaked resulting in a 4.1 million dollar fine levied against Range for the leaking Yeager Impoundment, contamination of groundwater, as well as for violations and environmental contamination at multiple other Range sites.

> a hydrogeological connection exists between his water well and the Range site. It is not enough for the Appellant to simply show that the Department was not aware of all the leaks or spills or that the Department had not reviewed all of the sampling data when it made its determination. Because the Board's review is *de novo*, we consider the case anew and may examine evidence that was not available to the Department when it made its decision.

See, Exhibit 8.

28. Subsequently on July 9, 2015, Mr. Kiskadden filed a Petition for Review with this Honorable Court seeking appellate review of the Board's Adjudication. Mr. Kiskadden argues that the Board's decision is not supported by substantial evidence, and that the Board capriciously disregarded evidence in reaching its decision.

29. Moreover, Mr. Kiskadden is a Plaintiff in a companion case currently proceeding before the Washington County Court of Common Pleas (the "*Haney v. Range*" action). In the *Haney v. Range* action, Mr. Kiskadden along with several other landowners surrounding the Yeager Site filed suit against Range and a number of other Defendants raising various claims for personal injury, water and air contamination, property damage, fraud and conspiracy (the "*Haney* Plaintiffs").

30. Counsel herein representing Mr. Kiskadden in the instant matter is also counsel for the *Haney* Plaintiffs. At the time of the merits hearing, Range's counsel was likewise counsel for Range in the *Haney v. Range* action as well.[7]

31. Discovery is continuing in the *Haney v. Range* action and, as a result,

[7] Range's current new appellate counsel, Overstreet & Nestor, were not counsel of record in the matter before the Board nor in the *Haney v. Range* action.

the *Haney* Plaintiffs continue to be served with responses and supplemental document productions on behalf of Range as well as other Defendants pursuant to that litigation. Many of the discovery requests served upon Range by the *Haney* Plaintiffs to some extent overlap and encompass similar subject matter that was requested from Range by Mr. Kiskadden through discovery in his appeal before the Board.

32. Most recently, Range produced documents pursuant to the *Haney v. Range* action on May 1, 2015 and August 27, 2015 – both of which came following the conclusion of the merits hearing relative to Mr. Kiskadden's appeal before the Board.

33. As a result of this corresponding case, Mr. Kiskadden has discovered new evidence which was not in his control or possession at the time of the merits hearing. Thus, this evidence recently produced by Range was not made part of the record before the Board nor before this Honorable Court on appeal. Instead, Range withheld this evidence and failed to produce it to Mr. Kiskadden in a timely manner.

34. Likewise, Universal Well Services, Inc. and Multi-Chem Group, LLC – the parties involved in the Joint Stipulations – have revealed information contrary to the Joint Stipulations in their possession that was not turned over to Mr. Kiskadden until after the conclusion of the merits hearing.

35. This new evidence is directly relevant and material to the Department's

Determination and, by extension, the Board's Adjudication.

36. Pursuant to Pa. R.A.P. 123, Mr. Kiskadden now files the instant Application requesting that this Honorable Court vacate the Board's Adjudication and remand this matter to the Board for further review based upon newly discovered evidence previously withheld from Mr. Kiskadden which was not part of the record currently before this Court.

II. LEGAL STANDARD

37. Pennsylvania Rule of Appellate Procedure 1551 sets forth this Honorable Court's scope of review relative to Mr. Kiskadden's Petition for Review. Rule 1551 provides, in part, as follows:

> (a) *Appellate jurisdiction petitions for review.* Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:
> ...
> (3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional questions within the scope of this paragraph should be so raised it shall remand the record to the government unit for further consideration of the additional question.
>
> *The Court may in any case remand the record to the government unit for further proceedings if the court deems them necessary*.

Pa. R.A.P. 1551 (a)(3). (emphasis added).

38. Thus, it is plain that this Honorable Court may remand this matter to the Board for resolution of issues not previously addressed. Moreover, the Pennsylvania

Superior Court explained the following regarding our system of appellate review:

> It is clear that where disputed facts must be resolved, appellate courts should refrain from assuming the role of a fact finder, either to sustain or to reverse the action of the court below. It is inappropriate for the Superior Court to make factual determinations based upon conflicting evidence. When the resolution of an issue is significant in the determination of an appeal, an appellate court should not attempt to substitute its judgment as a fact finder, but rather, should remand the matter to the trial court or other fact finder which considered the evidence pertinent to the critical questions presented.

Lanard & Axilbund, Inc. v. Muscara, 575 A.2d 615, 619 (Pa. Super. 1990). (internal citations omitted); *see also*, *R&S Millwork, Inc. v, Com. Dept. of Transp.*, 401 A.2d 587, 588 (Pa. Cmwlth. 1979). ("Findings of fact, questions of credibility, and resolution of testimonial conflicts are for the trial court, not this Court on review.")

39. In the matter *sub judice*, remand to the Board is necessary for the consideration of after-acquired evidence that is not part of the record on appeal. This Honorable Court has stated that it is "familiar" with motions requesting a new hearing for the consideration of after-acquired evidence. *Gamma Swim Club, Inc. v. Com. Dept. of Transp.*, 505 A.2d 342, 343 (Pa. Cmwlth. 1986).

40. Specifically, in *Gamma Swim Club*, this Court was confronted with a motion to remand to the trial court to permit appellant to present evidence regarding matters that occurred following the hearing. *Id.* This Court explained, "[b]ecause the [appellant's] motion most closely resembles a motion for new trial to consider after-acquired evidence, we will evaluate the motion before us in that light." *Id.*

41. As such, this Court held that in order to obtain remand, the appellant must show that the after-acquired evidence:

a. was discovered after the trial;

b. could not have been obtained by reasonable diligence in time for trial;

c. is not cumulative or merely to impeach credibility; and

d. is likely to compel a different result.[8]

505 A.2d at 343. (*citing, R&S Millwork, Inc. v. Department of Transp.*, 401 A.2d 587 (Pa. 1979)).

42. In *Mest*, this Honorable Court held that due diligence had been exercised in trying to obtain new evidence where extensive discovery had taken place prior to trial in an attempt to discover the evidence which was revealed after trial. *Perkiomen Twp. v. Mest*, 499 A.2d 706, 709 (Pa. Cmwlth. 1985). (*judgment rev'd on other grounds*, 522 A.2d 516 (Pa. 1987)).

43. Moreover, this Honorable Court has held that a new hearing is warranted where new evidence demonstrates to the Court that perjury was committed regarding a relevant and material matter. *Matter of Cook*, 527 A.2d 1115, 1116-1117 (Pa. Cmwlth. 1987). "[T]he law is clear that a request for new trial on the basis of after-

[8] This Court ultimately denied the appellant's motion to remand because the appellant conceded that the after-acquired evidence was not necessary to its case. *Gamma Swim Club*, 505 A.2d at 343-344. Consequently, the appellant failed to satisfy the standards set by the Commonwealth Court for evaluating the propriety of a motion to remand as a result of newly discovered evidence. *Id.* ("That cautious assertion negates the requisite that the evidence to be considered is likely to compel a different result, making a remand here meaningless.")

discovered perjured testimony will be granted where the court determines that a fraud has been perpetrated upon the court regarding a matter which is relevant and material to a case." *Id.* at 1117.

44. Thus, where it is discovered after trial that evidence presented at trial was false, a party may secure a new trial where the Court's decision was rendered based upon, or was materially enhanced by, the false evidence. *See*, *McCabe v. Pennsylvania R. Co.*, 166 A. 843 (Pa. 1933); *Candelore v. Glauser*, 140 A. 525 (Pa. 1928); *Crouse v. Volas*, 178 A. 414 (Pa. Super. 1935).

45. Such evidence will not be considered "cumulative" nor will it be viewed as merely serving an "impeachment" purpose. *See*, *Id.*; *see also*, *cf.*, *Rice v. Bauer*, 59 A.2d 885 (Pa. 1948).

46. The new evidence outlined herein by Mr. Kiskadden satisfies the foregoing standards set by this Honorable Court warranting remand to the Board. As will be demonstrated in detail below:

a. Mr. Kiskadden attempted to discover the new evidence prior to trial by seeking such information through discovery processes. Despite these attempts and an Order from Board requiring disclosure, Range never provided the sought-after information in its possession to Mr. Kiskadden until following the close of the hearing before the Board in another proceeding.

b. The discovery of this new evidence demonstrates that a fraud was perpetuated upon the Board and Mr. Kiskadden through the presentation of incomplete and less-than-accurate evidence during the merits hearing. Being distinct from and contradictory to other facts presented, the new information is not cumulative of evidence already before the Board.

c. Due to the reasoning relied upon by the Board in reaching its opinion in the Adjudication, the new evidence does not merely serve an impeachment purpose. To the contrary, the new evidence is directly relevant, material and contradictory to the evidence the Board utilized in supporting its rationale.

d. The new evidence discovered by Mr. Kiskadden further demonstrates that the Board erred in its Adjudication. The after-acquired information strikes at the heart of the Board's reasoning. If this information had properly been placed before the Board during the merits hearing, the Board would have likely reached a different result.

47. Each piece of after-acquired evidence discovered by Mr. Kiskadden will be addressed in turn below.

III. ARGUMENT

A. Mr. Kiskadden discovered evidence, not previously disclosed, that multiple chemical frac "tracers"[9] were used by Range during operations at the Yeager Site and a minimum of one (1) newly disclosed tracer was detected in Mr. Kiskadden's drinking water.

48. As outlined above, through the process of this appeal before the Board, Mr. Kiskadden requested and the Board ordered that Range provide certain information about products and chemicals used or brought to the Yeager Site by various companies. Specifically, Mr. Kiskadden served the following requests upon

[9] A "tracer" is defined as "a substance introduced into a biological organism or other system so that its subsequent distribution can be readily followed from its color, fluorescence, radioactivity, or other distinctive property." *See*, https://www.google.com/search?sourceid=ie7&q=what+does+tracer+mean&rls=com.microsoft:en-US:IE-Address&ie=UTF-8&oe=UTF-8&rlz=1I7LENP&gws_rd=ssl

Range:

- Please produce any and all documents, including but not limited to MSDS, which identify all proprietary chemicals, substances and products used in any drilling fluid or mud at the Yeager Site.
- Please produce any and all documents, including but not limited to MSDS, which identify all proprietary chemicals, substances and products used in stimulating the Yeager Well 7H.

See, Exhibit 1, at Nos. 38 and 42.

49. In response, Range produced only limited information that failed to disclose a full list of products used or brought to the Yeager Site, including the full composition of those products. *See*, Range August 20, 2013 Response, attached hereto as **Exhibit 9**. This list did not include any mention of any chemical frac "tracers" utilized at the Yeager Site.

50. Other than the production of selected MSDS which did not identify a product's complete composition, Range consistently represented to the Board that it was not aware of, and did not have in its possession, any other chemicals used in the products at the Yeager Site. *See*, *e.g.*, June 26, 2013 Transcript of Argument before the Board, selected pages attached hereto as **Exhibit 10**. Indeed, Range's argued in response to Mr. Kiskadden's Motion to Compel and Adverse Inference Motion that this information was not in the possession, custody or control of Range such that it

could not be produced. *See*, Range's Response to Adverse Inference Motion and Brief in Support, Pa. EHB Docket Nos. 206 & 207. In the *Haney v. Range* action, Range made similar representations to the Court of Common Pleas of Washington County as well as the Pennsylvania Superior Court.

51. In conjunction with that above, Mr. Kiskadden served the following Interrogatory upon Range:

> Please identify each and every of the following products listed in Table 1 (below)[10] by including the following:
>
> a. Whether the product was used at the Yeager Wells (including which of the Yeager wells), the Yeager Impoundment and/or the Yeager Drill Cuttings Pit;
>
> b. When the product was used at each of the applicable locations designated in subsection (a);
>
> c. The purpose for which the product was used at each of the applicable locations designated in subsection (a)
>
> d. What stage of drilling operations was the product used at each of the applicable locations designated in subsection (a);
>
> e. What company supplied the product to be used at each of the applicable locations designated in subsection (a);
>
> f. What chemicals, including all proprietary chemicals, make-up the product;
>
> g. What company applied the product at each of the applicable locations designated in subsection (a); and

[10] Table 1 included a list of all products listed by Range in its Preparedness, Prevention and Contingency Plan ("PPC Plan") submitted to the Department relative to its Washington County drill sites generally within which the Yeager Site is included. The PPC Plan did not include or identify any chemical frac tracer products. Yet, the Department **requires** an operator to list all of the products used at its drill sites in its PPC Plan.

h. All manufacturing information for the product.

See, Exhibit 2, at No. 7.

52. Range initially responded by providing a list of products that "may" have been used at the Yeager Site. *See*, Range Responses to Appellant's First Set of Interrogatories, selected pages attached hereto as **Exhibit 11**. As such, Mr. Kiskadden filed a Motion to Compel with the Board requesting that Range definitively identify the products used at the Yeager Site. *See*, Appellant's Motion to Compel Discovery from Range, Pa. EHB Docket No. 161. Additionally, this initial list provided by Range did not contain any products identifying chemical tracers used at the Yeager Site.

53. In a subsequent filing, Range stated "with respect to products used in the actual drilling and production of the Yeager Well, *Range has very clearly provided that information*." *See*, Range Response in Opposition to Appellant's Motion to Renew Motion to Compel, Pa. EHB Docket No. 164, at ¶ 16. In so stating, Range referenced its discovery responses that purportedly identified all products used at the Yeager Site. *See*, Range Amended Responses to Appellant's Request for Production of Documents, selected pages attached hereto as **Exhibit 12**. Range verified the veracity of these discovery responses pursuant to Pennsylvania law and nowhere did Range disclose its use of products housing chemical tracers or its engagement of a company to perform chemical frac "tracing" services. *See*, Range Verification to Amended Responses to Request for Production of Documents, attached hereto as

Exhibit 13.

54. The foregoing requests were subject to Motions to Compel as well as the Adverse Inference Motion filed by Mr. Kiskadden discussed above. As outlined above, the production of information regarding the chemical composition of all products used at the Yeager Site was heavily litigated before the Board during the discovery phase, and Range was ordered by the Board to produce the information. Still, going into the merits hearing Mr. Kiskadden was left with less-than-complete information regarding all of the products and all of chemicals used at the Yeager Site.

55. Following the merits hearing before the Board, pursuant to the *Haney v. Range* action counsel for 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. Multi-Chem manufactured and supplied certain products for use at the Yeager Site. In the deposition, Multi-Chem admitted for the first time that tracers were used, but would not reveal the identity of the chemical tracer in its product:

> **Q**: And with regard to Multi-Chem's products that they sell for hydraulic fracturing, does Multi-Chem sell any product for hydraulic fracturing that contains a tracer?
>
> Mr. LaSOTA: Object to form. Define Tracer.

Q: A red dye. Some sort of indication that Multi-Chem would be able to tell, if it chose to do studies, where those particular products went in the earth, anywhere that they may go?

Mr. LaSOTA: Objection.

A: So the knowledge that I have, which is limited in general, is that we do have certain products where we can assess for presence or absence tests, so tracer is a word that I have heard before.

Q: So you're aware of Multi-Chem having products that it sells to oil and gas operators for a hydraulic frac that contain tracers; is that right?

Mr. LaSOTA: Object to form.

A: MC S-2510T has a tracer in it. And that product is used in hydraulic fracturing by other companies.

See, Deposition Transcript of Amanda Burwell, at pp. 99-100, selected pages attached hereto as **Exhibit 24**.

56. Subsequent to this testimony being revealed, counsel herein began to further inquire about the use of possible additional "tracers" at the Yeager Site. On or about June 11 & 12, 2015, counsel herein took the deposition of a representative from Universal Well Services, Inc. ("Universal") pursuant to the *Haney v. Range* action.

57. Universal was contracted by Range to perform the hydraulic fracturing process for the Yeager 7H Well at the Yeager Site. The Universal representative explained that any company providing a "tracer service" would be separate from Universal and *contracted directly by Range*:

Q: If a tracer service was utilized at a well site that Universal had the responsibility of doing a hydraulic fracture on, would it be Universal Well that would contract with a subcontracting company to do the tracer

service, or would it be the well operator that would contract with the subcontracting company to do that tracer service…

…

A: To the best of my knowledge, it would be the operating company.

See, Deposition Transcript of James S. Fontaine, Jr., at pp. 21-22, selected pages attached hereto as **Exhibit 14**.

Q: **Are you aware of the term "tracer" in relation to frack fluid?**

A: **Yes, I am.**

Q: Okay. Does Universal Well in any of the products that it utilized to hydraulically fracture Yeager 7H contain tracers?

A: We do not supply any tracers, no.

Q: And when you say Universal Well doesn't supply any tracers, you're aware that in addition to the additives used by Universal Well, that other products were also added to the hydraulic fracking fluid used to frack Universal wells that were not products bought and brought to the site by Universal Well, correct?

A: I'm not aware of that. If that were the case, that would have been a third party hired by the operator to work in conjunction with our folks on location **to introduce a tracer material to the fracturing fluid.**

See, Exhibit 14, at pp. 189-191. (emphasis added).

58. Moreover, the Universal representative further explained the purpose of contracting a "tracer service" at a natural gas drilling operation:

… [T]ypically, the intent is to run **a different chemical tracer in each stage** that is being completed, and then the flowback water is sampled and you can see the water is flowing. But say there are ten stages in a well, **ten different tracers**, you can see and estimate what volume of flowback is coming from Stage 10 versus Stage 2.

See, Exhibit 14, at pp. 192-193. (emphasis added).

59. In other words, the addition of a chemical tracer to a well that is undergoing the hydraulic fracturing allows an operator to determine or "trace" where its injected fluids have reached following injection.

60. Through the testimony of Universal's representative, it was first revealed that a previously-undisclosed company hired by Range was known to provide chemical tracers named "Protechnics[11]" was on-site during the initial stages of the hydraulic fracturing process for the Yeager 7H Well. In particular, the Universal representative provided the following testimony regarding a "sign-in" sheet[12] that was produced by Universal in the *Haney v. Range* action:

Q: And it also indicates that a company Protechnics was there?

A: Yes, I see that.

Q: What do they do?

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[11] Protechnics is a division of Core Laboratories with a Pennsylvania address of 375 Southpointe Blvd., Suite 330, Canonsburg, Washington County, Pennsylvania, 15317.

[12] The *Haney* Plaintiffs requested production of these "sign-in" sheets that were used at the Yeager Site. Range provided a response that was verified by Mr. Carl Carlson of Range, the only Range employee to testify at the merits hearing. In this response, Range stated as follows: "Subject to Range's General Objections, this Request is further objected as unduly burdensome, oppressive, annoying, unreasonably cumulative and duplicative. By way of further Response, Range only keeps visitation logs for the Yeager Site for a period of ninety (90) days. As such, Range is no longer in possession of the "sign in and/or visitation logs" requested. By way of further response, Range refers Plaintiffs to the numerous invoices and other documents produced in this case that identify personnel present at the Yeager Site when work was being performed at the Yeager Site." *See*, Range Resources' Objections and Responses to Plaintiffs' Fifth Request for Production of Documents, selected pages attached hereto as **Exhibit 15.** No prior documents or invoices were produced until August of 2015 that evidenced Protechnics being at the Yeager Site or demonstrated its role with chemical tracing.

A: I'm not sure that it's the only thing they do, **but they are the company we spoke of yesterday that does the chemical tracers.**

Q: And do you know why they would be there on the first day, the setup day?

A: Because it's the setup day. And assuming that **they are going to be injecting tracers into the frack stages**, they could be working in conjunction with our people to set their equipment up.

See, Exhibit 14, at p. 378. (emphasis added).

61. Importantly, the existence of Protechnics, a company hired by Range to inject tracers into its fracturing fluids, was never previously disclosed by Range in any verified response to discovery requests propounded by Mr. Kiskadden in any proceeding. Despite being ordered by the Board to do so, Range neither identified Protechnics as a subcontractor, a product supplier nor as a chemical manufacturer for any products used at the Yeager Site.[13] Until recently, Protechnics' existence and presence at the Yeager Site using tracers was never provided to Mr. Kiskadden nor the Board.

62. Additionally, during discovery in the instant matter, Range never

[13] Similarly, the Haney Plaintiffs directed the following Interrogatory to Range: "Please identify each and every manufacturer that supplied chemicals for use by Range in the hydraulic fracturing activities at the Yeager Site. Include in your response the type of chemical supplied, the purpose the chemical was used for, and the amount of the chemical used." *See*, Range Responses to First Set of Interrogatories in *Haney v. Range* action, at No. 89, selected pages attached hereto as **Exhibit 25**. Range responded: "Range objects to Plaintiffs' Requests to the extent that Plaintiffs seek information that Range has already made available to Plaintiffs' attorneys in discovery in related matters, including documents produced in Kiskadden v. Department of Environmental Protection, Docket No. 2011-149-R and Voyles v. Pennsylvania Department of Environmental Protection, Docket No. 253 M.D. 2011." *Id.*

included any Protechnics' products as part of its "investigation" into the chemical constituency of products used at the Yeager Site. Protechnics and its products were not identified in Range's discovery responses that purportedly disclosed all products used during hydraulic fracturing at the Yeager Site. Protechnics was not made part of Range's letter writing campaign seeking information about chemicals used nor was it included in the summary report of companies and products following the "reverse engineering" efforts. Range's entire process in which it purportedly attempted to disclose all products and all chemicals used at the Yeager Site is bereft of any reference to Protechnics and its chemical tracer products.

63. Importantly, from the early stages of these processes Range was under Order from the Board to provide Mr. Kiskadden with a complete list of all products and all chemicals used at the Yeager Site. Notwithstanding this Order, it is now apparent that Range further violated the Board's July 19th Order and failed to identify known Protechnics' products and chemicals in its possession as stated above.

64. As a result of the Universal testimony, counsel herein began to further investigate the involvement of Protechnics at the Yeager Site. To that end, the *Haney* Plaintiffs, inclusive of Mr. Kiskadden, served a Notice of Intent to Serve Subpoena to Produce Documents and Things for Discovery (the "Notice") upon all Defendants in the *Haney v. Range* action, including Range. This Notice informed Range that the *Haney* Plaintiffs intended to serve a subpoena upon Protechnics requesting documents

relative to its activities at the Yeager Site.

65. Following Range's receipt of the Notice, but prior to the *Haney* Plaintiffs' receipt of any documents directly from Protechnics, Range served upon the *Haney* Plaintiffs a supplemental document production. This production was dated August 27, 2015 (the "August 27th Production") – following both the merits hearing before the Board as well as the Board's issuance of its Adjudication, and Mr. Kiskadden's Petition for Review.

66. For the first time, the August 27th production contained Protechnics documents in Range's possession conclusively demonstrating that the previously undisclosed chemical tracer products were in fact used at the Yeager Site during the hydraulic fracturing of the Yeager 7H Well. *See*, Protechnics Records, attached hereto as **Exhibit 16**. These documents provided by Range are from *2009* and were neither produced to Mr. Kiskadden nor the Board.

67. As such, Range was in possession of information regarding the hiring of Protechnics and the use of products housing chemical tracers at the Yeager Site as well as at other Range drill sites that flowed fluids back to the leaking Yeager Site for years: 1) during discovery before the Board; 2) during the time the Board ordered Range to produce information regarding all products and all chemicals used at the Yeager Site; 3) during the Board's imposition of a sanction against Range for non-disclosure; 4) during the merits hearing before the Board; 5) during post-hearing

briefing before the Board; and 6) following the Board's Adjudication. At no point in time did Range come forward with this evidence which was specifically responsive to Mr. Kiskadden's requests and compelled by the July 19th Order of the Board.

68. Notably, as stated above, in response to Mr. Kiskadden's numerous requests and the Board's July 19th Order, Range never previously disclosed that any chemical frac tracer products were used at the Yeager Site that would allow Range to track how far its fracturing fluids had travelled. This is problematic on two (2) separate fronts: 1) initially, Range represented that it definitively identified all products used at the Yeager Site and there is no reference to Protechnics or its products; and 2) secondarily, Range had in its possession information identifying, at least partially, the content of the chemical tracers used at the Yeager Site and this evidence was withheld from Mr. Kiskadden and the Board. Both of these deficiencies were in violation of the discovery rules and the Board's July 19th Order. Range defended against Mr. Kiskadden's Motion to Compel and Adverse Inference Motion by explaining to the Board that it had provided all the information it had in its possession.

69. At the very least, Range's failure to disclose Protechnics and the tracer products and chemicals evidences further violation of the Board's July 19th Order and would have effected Mr. Kiskadden's presentation and arguments in support of the

Adverse Inference Motion.[14] Further, the Board's resolution and institution of an appropriate sanction in response to the Adverse Inference Motion would have been different and more severe than that employed during the merits hearing. The Board should have the opportunity to revisit the sanction and enter additional sanctions for non-compliance with its Order and the withholding of evidence.

70. Critically, the Board's substantive application of this after-acquired evidence to the facts of this case would prove directly contradictory to a number of findings made by the Board and relied upon heavily by the Board in reaching its final conclusion in the Adjudication.

71. Independent of other companies that used tracers at the Yeager Site that were also not revealed, the Protechnics documents reveal that Range engaged Protechnics to provide at least three (3) solid chemical tracers and eight (8) liquid chemical tracers for use at the Yeager Site and most likely at other sites that continually flowed back to the leaking Yeager Site throughout its operation. *See*, Exhibit 16. Additional information regarding Protechnics' tracers indicate that the chemical frac tracers could be found in water for years after their injection.

72. The solid chemical frac tracers disclosed to date were: antimony,

[14] The Board would have been called upon to enter a sanction by way of adverse inference that the tracers were used and found in Mr. Kiskadden's water, thereby further establishing a conclusive hydrogeological connection between the Yeager Site, where these tracers were used, and Mr. Kiskadden's drinking water.

iridium, and scandium. The liquid chemical tracer products were: CFT 1100, CFT 1200, CFT 1700, CFT 1900, CFT 2000, CFT 2100, CFT 1000, and CFT 1300. The acronym "CFT" stands for "**Chemical Frac Tracer**." None of these products were identified as used at the Yeager Site in a list provided to the Department, the Board, the Court of Common Pleas of Washington County or the Pennsylvania Superior Court, despite representations that Range provided all information it had in its possession.

73. The constituency of the liquid tracers has been designated, in part, as proprietary by Protechnics and remains unknown. Without knowing Protechnics existed, Mr. Kiskadden did not seek additional documentation from Protechnics nor did he take the deposition of Protechnics personnel to learn additional information about the route and distance the fracturing fluids travel, including migration through the fracture network, as measured by the tracers and what the additional tracer components were.

74. While the documents do not disclose the constituency of the liquid tracers, Mr. Kiskadden has been able to discover the constituency of at least some of the solid tracers which are not proprietary and were readily available and ascertainable by Range.

75. Previously known by Range, two (2) out of the three (3) solid chemical tracers – iridium and scandium – while used at the Yeager Site, were not likewise

tested for in Mr. Kiskadden's drinking water. Range itself tested Mr. Kiskadden's water on separate occasions. Yet, Range never undertook any effort to include in its sample analyses the specific constituents identified by Protechnics as the known chemical frac tracers used at the leaking Yeager Site. Mr. Kiskadden was likewise denied this information negating his ability to test for tracer chemicals in his water himself.

76. Range hired Protechnics for the purpose of injecting certain chemical frac tracers into its drilling fluids to determine where those fluids would go once injected into the ground and released into the environment. Perhaps unsurprisingly, when called upon determine if its drilling fluids had reached Mr. Kiskadden's drinking water source, Range turned a blind eye to testing for the host of known chemical frac tracers available for this exact purpose.

77. Because the identity of these chemical frac tracers were never revealed to Mr. Kiskadden, he was never provided with the opportunity to request that his water be tested for these known tracer constituents by Range or the Department. These facts give rise to further sanction against Range for the spoliation of evidence and demonstrate the need for an additional appropriate sanction for the continued knowing violation of the Board's Order.[15] The Board's sanction was limited in part as the Board

[15] The Pennsylvania Supreme Court has explained, "spoliation of evidence is the non-preservation or significant alteration of evidence for pending or future litigation." *Pvertiz v. Commonwealth*, 32 A.3d 687, 691 (Pa. 2011). A determination that spoliation of evidence has occurred leads to a

found that: "... we disagree that spoliation has occurred, since Range has not engaged in the destruction or **withholding of evidence**..." *See*, Exhibit 6. (emphasis added).

78. While Mr. Kiskadden's water was not tested for the majority of the solid chemical frac tracers, by happenstance his water was in fact tested for at least one (1) of the known solid tracers used at the Yeager Site through use of EPA testing method 200.8.

79. Namely, the Protechnics chemical frac tracer that was included within EPA test method 200.8 was *antimony*. *See*, Exhibit 16. During the sampling that took place on June 6, 2011, *antimony* – a chemical frac tracer used at the Yeager Site – was detected in Mr. Kiskadden's drinking water. *See*, June 6, 2011 Water Sampling Results, attached hereto as **Exhibit 17**. However, neither Mr. Kiskadden nor the Board could identify this contaminant as a chemical frac tracer as it was unknown both to him and to the Board at the time of the hearing and prior to the Board reaching its decision.[16]

'spoliation sanction,' which may be determined in the Court's discretion. *Schroeder v. PennDOT*, 710 A.2d 23, 28 (Pa. 1998). Where evidence which would properly be part of a case is within the control of a party in whose interest it would naturally be to produce it, and without satisfactory explanation he failed to do so, the court in a bench trial, or jury in a jury trial, may draw an inference that it would be unfavorable to that party. *Magette v. Goodman*, 771 A.2d 775, 780 (Pa. Super. 2000). An adverse inference is commonly applied where "relevant evidence" is no longer available. *Schmid v. Milwaukee Electric Tool Corporation*, 13 F.3d 76, 78-9 (3d Cir. 1994).

[16] Antimony was tested for and detected by the Department in Mr. Kiskadden's water, but the Department purposefully denied itself these results. Additionally, this finding was initially withheld from Mr. Kiskadden until later discovery efforts revealed the Department's practice of withholding full test results through its use of "Standard Analysis Codes". It remains unknown

80. Not only was antimony detected in Mr. Kiskadden's water, it was present at a level exceeding the Maximum Contaminant Level (MCL)[17] established by the EPA. *See*, Drinking Water Maximum Contaminant Levels, attached hereto as **Exhibit 18**. The EPA has set a MCL for antimony at 0.006 mg/L. *See*, Exhibit 18. Antimony was detected in Mr. Kiskadden's water at 0.025 mg/L – approximately four (4) times higher than what the EPA has determined is an acceptable level, if found in drinking water at all. *See*, Exhibit 17.

81. Range's use of antimony as a chemical frac tracer belies the Board's conclusion that many of the parameters detected in Mr. Kiskadden's water were attributable to natural elements rather than ongoing natural gas drilling operations at the Yeager Site. The Board expressly stated:

> The Appellant produced hundreds of pages of sampling results showing that numerous parameters had been detected in Mr. Kiskadden's water that were also detected in sampling at the Yeager site. The problem is that most of those parameters can also be found naturally in groundwater. Thus, their mere detection in a sample is not enough to prove a hydrogeologic connection.

See, Adjudication, Exhibit 8, at p. 47.

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whether the Department knew about the tracers being used and purposefully sought to deny itself data on the presence of tracers in Mr. Kiskadden's water or whether it did not know of the chemical frac tracers' use or their content. Both positions are equally problematic.

[17] The EPA defines a "Maximum Contaminant Level" as "the highest level of a contaminant that is allowed in drinking water." *See*, http://water.epa.gov/drink/contaminants/index.cfm. MCLs are promulgated pursuant to the National Primary Drinking Water Regulations which are, "legally enforceable standards that apply to public water systems," and are designed to, "protect public health by limiting the levels of contaminants in drinking water." *Id.* Since the Department denied itself data, it never informed Mr. Kiskadden of the MCL violation relative to antimony.

82. In effect, if a parameter, known to be associated with oil and gas contamination, was detected in Mr. Kiskadden's water that was not man-made, the Board acted wrongfully by automatically dismissing that parameter as being "found naturally in groundwater." Despite the fact that the Department primarily relies on the presence of these very naturally occurring elements to make water quality determinations, the Board summarily ignored these as well as accompanying man-made constituents in Mr. Kiskadden's water. Moreover, no evidence of record shows that antimony is typically found in any amount in background water in Washington County. However, Mr. Kiskadden's after-acquired evidence demonstrates the fallacy and shortcoming of the Board's discounting the detections of naturally occurring elements in Mr. Kiskadden's water without knowing the importance and use of naturally occurring elements in natural gas drilling operations.[18]

83. *Antimony was used by Range as a chemical frac tracer at the Yeager Site to determine the distances its hydraulic fracturing had travelled*, in a fashion that was obviously distinct from any feature of possible low-levels of naturally-occurring antimony. Further, antimony was detected at elevated levels (above Maximum

[18] For a more developed explanation, please see the Brief of Petitioner where it is maintained that the rebuttable presumption entered by the Board was not utilized and was summarily discarded. This further demonstrates the importance of knowing all constituents used in products and released into the groundwater at the Yeager Site and the need for the Board's implementation of a sanction in the form of an adverse inference. Although, in this instance, the Board without basis or reason failed to employ its own sanction of a rebuttable presumption.

Contaminant Levels) above those acceptable by the EPA's drinking water standards. Because this evidence was not before the Board, it was not considered in the Board's evaluation of Mr. Kiskadden's claim.

84. Instead of presenting "mere detections" of naturally occurring elements, this evidence would have allowed Mr. Kiskadden to further demonstrate to the Board that elements could otherwise be "naturally" within the earth were directly attributable to Range's operations and use at the Yeager Site. The definitive purpose of Protechnic's products was to show the flow of contaminants underground. Thus, the appearance of the chemical frac tracer in Mr. Kiskadden's drinking water, with more forty (40) other known oil and gas-related parameters found leaking at the Yeager Site,[19] demonstrates the "hydrogeologic connection" that the Board was looking for.

85. Furthermore, the Board issued a finding that certain contaminants, "... exist naturally in the groundwater in Pennsylvania, and in groundwater in Washington County in particular." *See*, Adjudication, Exhibit 8, at ¶ 96. The Board apparently relied upon this finding all the while being uninformed about Range's use of a "naturally occurring" chemical frac tracer that was detected in an elevated amount in Mr. Kiskadden's water. No evidence was presented at the hearing that antimony was naturally occurring in groundwater in Mr. Kiskadden's area or in the amount in Mr.

[19] The parameters detected in Mr. Kiskadden's water include man-made parameters such as toluene, ethyl benzene, m+p xylene, o-xylene, acetone, t-butyl alcohol, MBAS, and Diesel Range Organics. Each of these were also found leaking at the Yeager Site prior to Mr. Kiskadden's water quality complaint and during the relevant time period.

Kiskadden's water that exceeded an MCL. Furthermore, no evidence was in the record that antimony was typical or even found in drinking water in Washington County nor was any evidence presented that antimony four (4) times above the MCL would be, or even could be, considered normal or natural.

86. Range perpetuated this position in front of the Board by offering testimony, through its expert, stating that Mr. Kiskadden's water supply represented normal background conditions. Range's expert testified that the "naturally occurring elements" in Mr. Kiskadden's water were consistent with that which would be expected for the area, but made no specific mention of and offered no evidence of how antimony levels above Maximum Contaminant Levels (MCL) were consistent with background conditions. In fact, Range's expert made no reference to antimony at all. Range offered this testimony with the awareness that a "naturally occurring element" – antimony – was also independently employed and released at the Yeager Site as a known chemical frac tracer.

87. Without being made aware of Protechnics and the fact that chemical frac tracers were used, Mr. Kiskadden is unaware what more Range knows about the other tracers used or flowed back to the Yeager Site that it likewise failed to disclose. Neither the Board nor Mr. Kiskadden are aware of whether the minimum other eight (8) liquid tracers were found or tested for in his drinking water. Mr. Kiskadden was denied the ability to conduct additional discovery regarding Protechnics to determine

what information, documentation or knowledge it had about all of the tracers used at the Yeager Site or brought to the Yeager Site from other drill sites. Moreover, Mr. Kiskadden could have discovered where the tracers were ultimately found by way of upward migration, migration through the groundwater network or through Range's groundwater monitoring wells.

88. As a result of the foregoing, this Honorable Court should vacate the Board's Adjudication and remand the instant matter to the Board for consideration of the after-acquired evidence, including the modification of the initial sanction levied against Range and the institution of an additional appropriate sanction against Range for the concealment of evidence in violation of the Board's Order and directive.

B. Mr. Kiskadden discovered evidence that the Joint Stipulation of Facts for Merits Hearing Concerning Universal Well Services, Inc. contained false representations regarding the chemical content of products used at the Yeager Site.

89. As explained above, the Parties entered into a Joint Stipulation of Facts for Merits Hearing Concerning Universal Well Services, Inc. (the "Joint Stipulation"). *See*, Universal Well Services, Inc. Joint Stipulation, attached hereto as **Exhibit 19**. This Joint Stipulation was entered into evidence before the Board and made part of the record for the Board's consideration.

90. The Joint Stipulation was entered to alleviate the need for additional witnesses and merely to confirm information provided to Mr. Kiskadden about products used at the Yeager Site. The Joint Stipulation provided, in part, as follows:

> Universal Well Services, Inc. ("Universal") contracted with Range to provide products and services in connection with the hydraulic fracturing process for the Yeager #7H natural gas well in Amwell Township, Washington County, Pennsylvania.

See, Exhibit 19, at ¶ 1.

91. The Joint Stipulation then identified products used and/or supplied by Universal for the hydraulic fracturing process of the Yeager 7H Well at the Yeager Site. As part of these products, Universal identified "SP-43X" and provided a corresponding MSDS for this product. *See*, Exhibit 19, at ¶ 4.

92. Further, the Joint Stipulation provided as follows:

> Universal's, the Department's, and Range's knowledge of the chemicals/constituents contained in the products listed above, which may have been used at the Yeager Site, is limited to the information contained on the MSDS. Some of the MSDS do not identify every constituent/chemical in the given product.

See, Exhibit 19, at ¶ 8.

93. The Joint Stipulation was contrary to Range's testimony at the merits hearing where it stated that it knew all of its fracturing chemicals:

> Q: I want to ask you specifically about the fracturing fluid that was used in the horizontal portion of the Yeager 7H. Now there has been a claim in this case and you may have heard it, that Range did not know what was in the fracturing fluids. Did Range know what was in the fracturing fluids?
>
> A: We did.

(R. 1594).

This testimony was readily proved to be inaccurate at the hearing and through Range agreeing to the Joint Stipulation. This testimony was further disproven in light of the revelation of the proprietary nature of certain chemical frac tracers used during hydraulic fracturing at the Yeager Site which remain undisclosed. The failure to disclose additional chemicals is further proof of this inaccurate testimony offered to the Board.

94. By entering into the Joint Stipulation, Mr. Kiskadden again relied upon the representations from Universal and, by extension Range, that its knowledge was limited to the information provided on product MSDS. With regard to product "SP-43X/Unihib A" in particular used in the hydraulic fracturing process, it fell into the category where its "MSDS [does] not identify every constituent/chemical in the given product." *See*, Exhibit 19, at ¶ 8.

95. Thus, Universal and Range represented that if the MSDS for a product utilized by Universal at the Yeager Site did not list the full chemical composition of that product, neither Universal nor Range knew and could disclose the complete composition of that product.

96. On August 12, 2015, almost a year after the close of the merits hearing before the Board and months after the Adjudication, Universal served the *Haney* Plaintiffs with a supplemental discovery production pursuant to the *Haney v. Range* action. These discovery responses – for the very first time – indicated that with regard

to at least one (1) of the products used by Universal in the hydraulic fracturing of Yeager 7H, Universal did in fact know the identity of chemical constituents not otherwise listed on the MSDS, contrary to the Joint Stipulation. That product was "SP-43X/Unihib A." *See*, Composition of SP-43X/Unihib A, attached hereto as **Exhibit 20**.

97. In fact, the newly discovered evidence revealed not only the identity of chemical constituents beyond those disclosed on the MSDS, but it also revealed the identity of chemicals in "SP-43X/Unihib A" that are listed as trade secret or proprietary. *See*, Exhibit 20. While the MSDS for "SP-43X/Unihib A" lists the presence of only (2) proprietary chemicals, the Universal documents reveal that "SP-43X/Unihib A" contains as many as five (5) proprietary chemicals. *See*, MSDS for SP-43X/Unihib A, attached hereto as **Exhibit 21**; *see also*, Exhibit 20.

98. According to Universal's supplemental production, this information was available since at least *2008*. *See*, Exhibit 20. Moreover, Range specifically identified "SP-43X/Unihib A" as a product used at the Yeager Site. Yet, despite its availability, neither Universal nor Range ever turned over information regarding the entire composition of "SP-43X/Unihib A" in discovery or before the Board issued its Adjudication.

99. Moreover, Universal also included in its production a document entitled "Green Chemical Update" dated November 9, 2009. In this Update, the following is

stated about product "SP-43X/Unihib A":

> Unihib A[20] is **the least environmentally friendly chemical** being used on the shale fracs. It is an acid corrosion inhibitor and therefore very little of the material is used on each well. However, it contains levels of BTEX, naphthalene, formaldehyde and propargyl alcohol.

See, Green Chemical Update, attached hereto as **Exhibit 22**. (emphasis added).

100. Specifically, this after-acquired evidence was unknown at the time of the hearing and is critical in further establishing a hydrogeological connection because the chemicals recently disclosed in product "SP-43X/Unihib A" include **ethyl-benzene** and **toluene**, man-made and hazardous components. *See*, Exhibit 20. Importantly, *both of these man-made, non-naturally occurring constituents were used in products at the leaking Yeager Site and* ***were also detected in Mr. Kiskadden's drinking water***.

101. In its Adjudication, the Board found as follows:

> The Appellant must demonstrate to us, the Board, that the leaks or spills or other activities at the Yeager site caused contamination to his well. In order to meet this burden, Mr. Kiskadden must demonstrate – by a preponderance of the evidence – that a hydrogeologic connection exists between the Yeager site and his water well. We find that Mr. Kiskadden has not made that showing by a preponderance of the evidence.

See, Adjudication, Exhibit 8, at p. 35.

102. The use and presence of ethyl-benzene and toluene at the leaking Yeager Site as well as its detection in Mr. Kiskadden's water further demonstrates the

[20] "Unihib A" is another name for "SP-43X."

existence of a hydrogeological connection and the source of Mr. Kiskadden's water contamination.[21] This newly discovered evidence becomes even more imperative in light of the testimony offered by the Department's expert explaining that the most *definitive test* to determine if a hydrogeological connection has been made is to determine whether constituents associated with drilling operations released at "Point A" ended up at "Point B." (R. 631a-R.632a). In other words, the Department's expert explained that the Board should look to determine if chemicals at a source, "Point A," then began appearing at "Point B." *Id.*

103. The Board was not provided with the opportunity to address this evidence of additional man-made chemicals in Mr. Kisakdden's water that were also conclusively used at a Yeager Site where fluids were consistently spilled, leaked, and released. This evidence of known frac-contaminants should have been considered in conjunction with other testimony and evidence before the Board. Because the Adjudication was issued in the absence of essential and decisive evidence, it must be vacated and this case remanded for review in light of the after-acquired evidence.

C. Mr. Kiskadden discovered evidence that the ATSDR determined Mr. Kiskadden's water was polluted and contaminated.

104. In the Adjudication, the Board found that: "Mr. Kiskadden's water type

[21] While many man-made parameters were detected in Mr. Kiskadden's water, initially these chemicals were concealed and not provided in the reported water test results. Through discovery, the full tests results revealed their presence in Mr. Kiskadden's water. This action encompasses much of Mr. Kiskadden's claims of fraud and conspiracy between Range and the testing laboratories that had the results but failed to report them to Mr. Kiskadden or the Department.

signature is consistent with the water type in his area and Washington County." *See*, Adjudication, Exhibit 8, at ¶ 127. In so stating, the Board largely relied upon the opinion offered by Range's expert to find that the chemistry of Mr. Kiskadden's water supply is typical groundwater.

105. However, Mr. Kiskadden recently discovered evidence following the merits hearing which conclusively demonstrates that Mr. Kiskadden's water is polluted such that it does not represent typical groundwater chemistry. *This evidence was in the hands of Range*.

106. Pursuant to the *Haney v. Range* action, Range served a supplemental document production upon the *Haney* Plaintiffs on May 1, 2015. This supplemental production revealed that Range previously submitted a Freedom of Information Act request to the EPA relative to Mr. Kiskadden's water sampling and water quality.

107. In return, Range received a "draft" letter from the United States Agency for Toxic Substances and Disease Registry[22] ("ATSDR") dated September 27, 2013. *See*, ATSDR Draft Letter, attached hereto as **Exhibit 23**. This letter provided a written summary of only the EPA's water sampling of Mr. Kiskadden's drinking water. In part, the ATSDR letter stated:

> As we discussed, **ATSDR believes the quality of your well water is poor and should not be used**. ATSDR uses "comparison values" to understand the levels of chemicals in your drinking water. Some of these comparison values are based on levels that could affect your

[22] The ATSDR is the health-based arm of the EPA.

health, and other are based on levels that could make your water either look or taste strange but may not affect your health. **We found some chemicals in your drinking water at levels that were high enough to affect your health and the overall quality of your drinking water.** For example:

- Sodium, pH, and total dissolved solids in your water were all higher than secondary drinking water quality standards. Drinking water with a high sodium level is a health concern for people who must limit how much sodium (salt) they eat or drink. People who drink this water and must limit their sodium intake should discuss this situation with their doctor. The high sodium, pH, and total dissolved solids levels in your water would also negatively affect the look and taste of your drinking water.

- The methane level in your water was higher than a safety level set by the U.S. Department of the Interior. The possible buildup of methane gas indoors can increase the risk for an explosion. ATSDR recommends that you install a combustible gas monitor in your home, ventilate your home, ventilate your well head, and remove anything that could cause a spark in enclosed areas of your home. Please note, drinking methane dissolved in well water is not considered a health concern.

- Arsenic in your water is lower than EPA's standard for public drinking water supplies, but it was higher than ATSDR's Cancer Risk Evaluation Guideline for this chemical. Drinking water every day over many years with this level of arsenic could cause a very low additional cancer risk.

- Diesel range organics (DRO) were found in your well water. We do not know if or how this group of compounds could affect a person's health. DRO in your water may indicate contamination from a petroleum source.[23]

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[23] Evidence was provided to the Board during the hearing that all six (6) of the groundwater well monitors installed by Range at the Yeager Site showed contaminated groundwater. All six (6) of the well monitors showed the presence of Diesel Range Organics and that Diesel Range Organics were likewise detected in Mr. Kiskadden's drinking water during the same time. The Board failed to address this evidence in its Adjudication.

> Based on this information, **ATSDR recommends that you treat your drinking water source or else use an alternative source for your drinking water**.

See, Exhibit 23. (emphasis added).

108. While Mr. Kiskadden previously spoke with the ATSDR about his water quality in light of EPA's testing alone, he was never aware that a written correspondence was created and was told that no writing would be forthcoming. Prior to its production from Range, neither Mr. Kiskadden nor his counsel knew that this "draft" letter even existed which contradicted Range's position at the merits hearing and the Board's finding.

109. The Board's finding that Mr. Kiskadden's water was consistent with typical water quality in the area stands directly in contradiction to this after-acquired evidence from the ATSDR. Specifically, the ATSDR expressly found that Mr. Kiskadden's well water was "poor and should not be used" because it could negatively affect his health – hardly typically of water quality in Washington County. In light of this evidence, Range withheld evidence from Mr. Kiskadden and the Board by arguing that Mr. Kiskadden's water was "normal" and fit the picture of local groundwater quality and was drinkable.

110. Because Mr. Kiskadden was denied this written evidence establishing that his drinking water was confirmed polluted by the ATSDR and not drinkable, Mr. Kiskadden was precluded from attacking the presentation of Range's position and the

Board's findings to the contrary. Moreover, Mr. Kiskadden's experts were denied the opportunity to review the ATSDR's findings as part of their investigation into Mr. Kiskadden's case. The ATSDR's written findings buttressed the positions of Mr. Kiskadden's experts.

111. The Board's finding that Mr. Kiskadden's water represented typical background water quality was seminal in its decision that Range's operations did not cause Mr. Kiskadden's drinking water contamination. Consequently, evidence disproving the Board's finding in this regard would likely require that the Board reach a different result.

112. The Board's Adjudication must be vacated and this case remanded to the Board for consideration of new evidence which reveals an apparent and obvious discrepancy. The evidence of record already reveals Range's prior concealment of other facts and data from the Department and Mr. Kiskadden. Through discovery Mr. Kiskadden was able to uncover some, but obviously not all of the previously withheld information. How much remains uncovered is unclear. Following the merits hearing before the Board, even more concealment has been revealed. The issues presented by the after-acquired evidence revealed herein require resolution by the Board in the first instance.

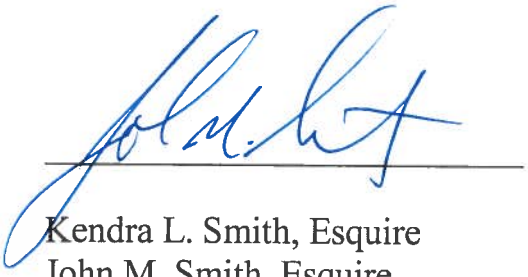
WHEREFORE, Petitioner respectfully requests that this Honorable Court enter an Order vacating the Pennsylvania Environmental Hearing Board's June 12, 2015

Opinion and Order and remanding this matter to the Board for further review.

Dated: October 14, 2015

Respectfully submitted,

SMITH BUTZ, LLC



Kendra L. Smith, Esquire
John M. Smith, Esquire
Counsel for Petitioner

VERIFICATION

I, John M. Smith, Esq., have read the foregoing **APPLICATION TO VACATE AND REMAND TO THE PENNSYLVANIA ENVIRONMENTAL HEARING BOARD.** The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

John M. Smith, Esq.

PROOF OF SERVICE

I, John M. Smith, Esquire, certify that on October 14, 2015, a true and correct copy of the foregoing Application to Vacate and Remand to the Pennsylvania Environmental Hearing Board was served on the following parties pursuant to Pa. R.A.P. 121, by United States Mail, First-Class, Postage pre-paid:

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COMMONWEALTH COURT OF PENNSYLVANIA

LOREN KISKADDEN Petitioner, vs. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC. Respondents.	)	**Docket No.** 1167 CD 2015

ORDER OF COURT

AND NOW, this _____ day of _____, 2015, upon consideration of Petitioner's Application to Vacate and Remand to Pennsylvania Environmental Hearing Board, it is hereby ORDERED, ADJUDGED and DECREED that the June 12, 2015 Opinion and Order of the Pennsylvania Environmental Hearing Board entered at Docket No. 2011-149-R is hereby VACATED. The instant matter is REMANDED to the Pennsylvania Environmental Hearing Board for further proceedings in light of Petitioner's after-acquired evidence.

BY THE COURT:

_____