COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLAS SCOTT and LINDA MARIE SCOTT	:	
v.	:	**EHB Docket No. 2022-075-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RICE DRILLING B, LLC, Permittee	:	**Issued: April 29, 2024**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By MaryAnne Wesdock, Judge

Synopsis

Summary judgment is granted to the Department of Environmental Protection and the Permittee on the question of whether the Department's issuance of gas well permits constitutes a taking of the Appellants' property. Neither the applicable law nor the facts of this case support the Appellants' claim that a taking has occurred. Additionally, the Appellants' remaining claims in this matter which were not dismissed in the prior Opinion denying the Permittee's motion to dismiss on the basis of mootness are hereby dismissed.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Douglas Scott and Linda Marie Scott (the Scotts) challenging the Department of Environmental Protection's (Department's) issuance of unconventional gas well permits to Rice Drilling B, LLC. The permits authorize the drilling of gas wells through coal seams owned by the Scotts on property located in Franklin Township, Greene County. The parties have filed motions for summary

judgment on the question of whether the Department's action constitutes a taking. On March 18, 2024, following a conference call with the Board, additional materials were submitted by the parties for inclusion in the summary judgment record.[1] This matter is ready for review.

Standard of Review

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Amerikohl Mining, Inc. v. DEP*, 2023 EHB 348, 351-52 (citing Pa.R.Civ.P. 1035.1-1035.2); *Pileggi v. DEP*, 2023 EHB 288, 290-91. Summary judgment may also be available under the following scenario:

> if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Id. at 290 (citing Pa.R.C.P. No. 1035.2(2)).

In *Marshall v DEP*, 2019 EHB 352, the Board explained: "Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a prima facie case." *Id.* at 353 (citing Note to Pa.R.C.P. No. 1035.2).

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Id*. (citing *Stedge v. DEP*, 2015 EHB 31, 33). All doubts as to whether genuine

[1]These materials include the Appellants' Stipulation of Facts (Appellants' Stipulation) and the Joint Stipulation of Facts filed on Behalf of the Department and Rice (Joint Stipulation of Department and Rice) (sometimes collectively referred to herein as "Stipulations"), as well as exhibits thereto.

issues of material fact remain must be resolved against the moving party. *Sierra Club v. DEP*, 2023 EHB 97, 99; *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406).

Factual and Procedural History

The Scotts own two parcels of land in Franklin Township, Greene County, Pennsylvania (the property). Their ownership interest includes the oil and gas estate and all underlying coal seams except for the Pittsburgh coal seam which had been previously severed. Based on the parties' Statements of Undisputed Material Facts (SUMF), responses thereto, Stipulations, and other documents in the record, we piece together the rather complicated history of this matter which originates in 1917 when the Scotts' predecessor-in-interest entered into an oil and gas lease with Peoples Natural Gas Company (the Gas Lease). (Permittee's SUMF 3; Appellants' Response to Permittee's SUMF 3; Ex. B to Permittee's Motion.) Mr. Scott purchased the property in 2002 and entered into an Amendment and Ratification of the Gas Lease in 2013. (Permittee's SUMF 5; Appellants' Response to Permittee's SUMF 5; Ex. C to Permittee's Motion.)

At some point between 2013 and 2019, EQT Production Company (EQT) became the Lessee under the Gas Lease. Litigation ensued between EQT and the Scotts, and on May 23, 2019, the Scotts and EQT entered into a Settlement Agreement under which EQT agreed to withdraw its lawsuit and pay the Scotts the sum of $260,000. (Ex. H and I to Permittee's Motion.) In turn, the Scotts agreed that EQT could enter their property to begin construction of a well pad. (*Id.*) As part of the Settlement Agreement, the Scotts executed an Amendment and Ratification of the Gas Lease (the 2019 Amendment) and a Coal Owner Permission to Drill (Permission to Drill). (Ex. D and E to Permittee's Motion.) The Permission to Drill granted permission to Rice Drilling B, LLC

(Rice)[2] to drill wells on the Scotts' property in 14 locations specified therein.[3] (Ex. D to Permittee's Motion.)

Shortly after the execution of these documents in 2019, the first group of wells were drilled on the Scotts' property: These wells were the Corsair 2H, 4H, 6H, 8H, 10H and 12H wells. (Ex. F to Permittee's Motion at 28:24-25 and 29:2; Permittee's SUMF 9; Appellants' Response to SUMF 9.) In April 2022, Rice applied for permits to drill the next set of Corsair wells: the 1H, 3H, 5H, 7H and 9H wells (the 2022 wells). (Permittee's SUMF 10; Appellants' Response to SUMF 10.) Notice was sent to the Scotts, including plats identifying the planned locations of the wells. (*Id*. at 12.) The location of the Corsair 1H, 3H, 5H, 7H and 9H wells was within 1,000 feet of a conventional well and involved drilling through coal seams owned by the Scotts. (Appellants' SUMF 3; Permittee's Response to SUMF 3.)

By letter to the Department dated April 22, 2022, the Scotts stated they objected to the issuance of the permits for the 2022 wells, claiming that Rice had "Failed to Request or Obtain a Waiver Under 58 P.S. § 507." This provision requires written consent when a well will be located within 1,000 feet of another well which penetrates a workable coal seam. The Scotts' letter stated:

> Douglas Scott is the owner of workable seams of coal that RICE's proposed wells will penetrate. These wells are located within 500' of an operating oil and gas well as shown on Exhibit 1 identified as well numbered 059-01229. RICE has neither requested nor obtained a waiver to space their wells closer than 1000' to this well. Scott has given waiver to a previous set of drilling permits on this location,

[2] According to the parties' Stipulations, Rice is a subsidiary of EQT. (Appellants' Stipulation, para. 3; Joint Stipulation of Department and Rice, para. 3.) Rice is the permittee in this appeal.

[3] The well locations agreed to by the Scotts in the Permission to Drill include the locations where the wells at issue in this appeal were permitted and subsequently drilled. (Ex. D to Permittee's Motion; Ex. F to Permittee's Motion at 50:7-13; Joint Stipulation of Department and Rice, para. 8; Appellants' Stipulation, para. 9.)

> filed in or about 2019. Scott has not given waiver to these current Permit Applications and hereby revokes any and all waivers.

(Ex. B to Attachment 1 of Notice of Appeal.)

Following the submission of information by Rice and the Scotts, the Department concluded that the Scotts' coal seams were not workable and, therefore, consent was not required under 58 P.S. § 507. (Ex. D and K to Attachment 1 of Notice of Appeal.) On August 23, 2022, the Department issued the well permits, and the Scotts filed this appeal. The Scotts did not seek a supersedeas of the permits.

On February 16, 2023, Rice filed a Motion to Dismiss, arguing that the appeal was moot since the 2022 wells had been drilled between August to October 2022 and there was no effective relief that the Board could grant. The Board denied the motion, finding that the matter was not moot since the Scotts had raised a takings claim in their Notice of Appeal. *Scott v. DEP and Rice Drilling B, LLC*, 2023 EHB 138. The Board held:

> While we agree with Rice that the Board cannot award damages in this matter, nonetheless "[i]t is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking." *Marshall v. DEP*, 2019 EHB 352, 354 (citing *Domiano v. Department of Environmental Protection*., 713 A.2d 713 (Pa. Cmwlth. 1998).

2023 EHB at 143 (additional citations omitted). Because the Board found that the takings claim prevented the appeal from being dismissed on grounds of mootness, the case was allowed to proceed. On December 28, 2023, this matter was reassigned to Docket No. 2022-075-W.

Discussion

All three of the parties have filed motions for summary judgment on the question of whether the Department's actions in this matter constitute a taking. The Scotts' takings argument is twofold: 1) the issuance of the well permits without their consent caused a physical taking of

their property by authorizing drilling through their coal seams and the sterilization of approximately 72,139 tons of coal, and 2) the Department's determination that their coal seams were not workable deprived them of the economically beneficial use of their coal. The Department disputes that a taking has occurred, arguing that the permits conveyed no property rights and, therefore, there can be no basis for the Scotts' claim that the permits resulted in a taking. Rice supports the Department's position and further argues that a taking could not have occurred because Rice was legally entitled to drill through the Scotts' coal by virtue of the Gas Lease, the 2019 Amendment thereto, and the Permission to Drill.

Viewing the record in the light most favorable to the Scotts, even if we assume that their coal is workable and their consent was required, they have failed to set forth the essential elements of a takings claim. Neither the facts nor the law support the Scotts' position that the Department's actions in this matter constitute a taking. For the reasons set forth below, we find that the Department and Rice are entitled to summary judgment on this issue.

Takings Analysis

The United States Constitution prohibits private property from being taken for public use without just compensation. U.S. CONST. Amend. V. Similarly, the Pennsylvania Constitution provides: "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. Art. I, § 10. Simply stated, a taking occurs when a governmental body takes private property for public use without just compensation.

In *People United to Save Homes (PUSH) v. Department of Environmental Protection*, 789 A.2d 319 (Pa. Cmwlth. 2001), the Commonwealth Court described a taking as follows:

> A taking occurs when the entity clothed with the power substantially deprives an owner of the use and enjoyment of his property...A

> taking may also occur if a regulation enacted for a public purpose under the government's police powers prevents the landowner from using his land.

Id. at 326-27 (citing *Machipongo Land & Coal Co. v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998)). A party claiming that a taking has occurred "has a heavy burden to develop the necessary facts and law to support such a claim." *M&M Stone Co. v. DEP*, 2008 EHB 24, 74.

The Scotts assert that the Department's issuance of the well permits to Rice and the designation of their coal as non-workable constitutes a taking for which they should be compensated. In reviewing their argument, we believe the Scotts have misconstrued what a taking is. Although we recognize that there is "no magic formula" that enables a court to determine whether a given government interference with property is a taking, *PBS Coals, Inc. v. Department of Transportation*, 244 A.3d 386, 398 (Pa. 2021), *cert. denied sub nom. PBS Coals, Inc. v. Pennsylvania Department of Transportation*, 142 S. Ct. 224 (2021), at a minimum, the action in question must meet the definition of a taking – i.e., private property taken for *public use* without just compensation. U.S. CONST. Amend. V; PA. CONST. Art. I, § 10. A taking occurs when a governmental action "goes too far" and "forces 'some people alone to bear *public burdens* which in all fairness and justice should be borne by the public as a whole.'" *Machipongo Land and Coal Co. v. Department of Environmental Protection*, 799 A.2d 751, 765 (Pa. 2002) (emphasis added) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 2458 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563 (1960)); *Davailus*, 2003 EHB 101, 121. *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978) (The Fifth Amendment's guarantee is designed to bar the government from forcing some people alone to bear public burdens.)

Here, there has been no taking of the Scotts' property for a public use. The Scotts have not been forced to bear any burdens that should in all fairness and justice be borne by the public. The Department's issuance of well permits to a private party – Rice – for the drilling of wells on the Scotts' property cannot be considered a "taking" in the constitutional sense. While the Scotts may believe that the Department erred or abused its discretion in issuing the permits and designating their coal as non-workable, there is no basis for their claim that the Department has "taken" their coal.

The cases cited by the Scotts in support of their proposition that a taking has occurred are not analogous to this matter. For example, the landmark case of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), relied upon extensively by the Scotts, involved the enactment of a statute aimed at protecting South Carolina's coastal zone that had the effect of preventing the petitioner from erecting habitable structures on his property. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 102 S. Ct. 3164 (1982) involved the adoption of a regulation that required landlords to allow cable companies to place cable facilities in their apartment buildings. These cases clearly involved actions taken by a governmental body for the purpose of benefiting the public.

In contrast to the cases cited by the Scotts, the Board has held on several occasions that the issuance of a permit to a private party has not resulted in the taking of another's property. In *Abod v. DEP*, 1997 EHB 872, the appellant landowners claimed that the Department's issuance of a permit allowing the construction of a dock and boathouse by a third-party constituted a taking of the appellants' property. Similar to the Scotts' argument, the appellants in *Abod* argued that, by granting the permit, the Department gave the permittees an interest in the appellants' land which they would not have had but for the permit. In rejecting the appellants' takings claim, the Board

held, "The issuance of a permit conveys the Department's decision that the proposed project satisfies the public's concern for safety, navigation and environmental conservation…*It goes no further*." *Id.* at 884 (emphasis added) (citing *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, 243). The Board continued:

> Assuming, based on the facts presented, that Appellants may lose the use and enjoyment of a portion of the property they now claim to own, that loss or deprivation is not "the direct and necessary consequence" of the Department's issuance of the permit. It is the direct consequence of Permittees' desire to place a dock on a site where ownership is in dispute.

Id. As with the 2022 well permits here, "the Department did not intend the scope of the permit to convey property rights or to settle any dispute on land ownership." *Id.* at 885.

Likewise, in *Bernie Enterprises*, the Department issued permits to a third-party for the repair and installation of surface water drainage facilities in connection with the repair of a storm sewer pipe. The appellant owned the land on which the drainage facilities were to be installed in connection with the project. Similar to the argument made by the Scotts, the appellant claimed that it never consented to the use of its land for these purposes and asserted that the Department had no legal right to issue the permits without the consent of the landowner. The Board dismissed the appeal and, in doing so, pointed out that the permits did not convey property rights or authorize any injury to property or invasion of rights. The Board determined that any right the permittee had to enter onto the appellant's property and engage in the activity authorized by the permits "must be established independent of the Permits. That issue is properly left to the Court of Common Pleas…." 1996 EHB at 243. Similarly, any right Rice had to enter the property for the purpose of drilling was established independent of the permits issued by the Department. That

matter is not before the Board; as in *Bernie Enterprises*, it is properly left to the Court of Common Pleas.[4]

We recognize that both *Abod* and *Bernie Enterprises* involved permits issued under the Dam Safety and Encroachments Act, which the Board acknowledged provided for a limited review by the Department. The permits here were issued under Pennsylvania's oil and gas laws which involve a very different set of permitting considerations. Therefore, we turn our attention to *Foundation Coal Resources Corp. v. DEP and Penneco Oil Co*., 2009 EHB 49, where, like here, the Board considered a challenge by a coal owner to the Department's issuance of oil and gas well permits. Although the adjudication of that matter did not involve a takings claim, the Board considered the question of whether the Department's issuance of oil and gas well permits interfered with the property rights of the appellant coal owner.

The facts of that matter are somewhat analogous to the present appeal in that the appellant, Foundation, was the owner of coal reserves in Greene County that were not being mined but which it claimed could be mined at some point in the future.[5] Foundation objected to the Department's issuance of oil and gas well permits to Penneco which it said would impact the operation of its future mine.[6] Following the filing of numerous motions and a hearing on the merits, the Board dismissed the appeal of the coal company on the basis that the Department had properly issued the permits for the drilling of oil and gas wells in accordance with the applicable laws. Although the coal owner did not pursue a takings claim, the Board did consider the question of property rights

[4] According to the parties' filings, there is litigation pending before the Courts of Common Pleas of both Allegheny County and Greene County between the Scotts and Rice/EQT over the payment of royalties and the latter's right to drill on the Scotts' property.

[5] Unlike the Scotts, Foundation claimed that the mines were projected and platted but not yet operational. The Board rejected this claim.

[6] Foundation did not raise a takings claim. Rather, it requested that certain conditions be added to the oil and gas permits to ensure the safe operation of its future mine.

and determined that permits for the drilling of oil and gas wells do **not** convey property rights to the oil and gas driller nor do they deprive the coal owner of its property rights. The Board held, "The issuance of the well permits by the Department constitutes an administrative action. *It is well established that well permits have no effect on the mining company's property rights or common law rights*." *Id.* at 52 (emphasis added).

Likewise, the permits issued to Rice for the drilling of the 2022 wells do not convey any property rights to Rice nor do they "take" any property rights from the Scotts. The permits are simply an authorization by the Department to conduct gas drilling in accordance with Pennsylvania's oil and gas laws and regulations. We agree with the following well-articulated statement by the Department:

> Here, it is undisputed that the Department granted Permittee permits to drill through Appellants' coal. However, like the dock-builder in *Abod*, or the stormwater permittee in *Bernie*, or the miner in *Foundation*, the permits are simply authorizations to do or build a thing in accord with Pennsylvania statutes...Property rights to drill are regulated by private deeds, leases, and contracts under the general jurisdiction of Pennsylvania's Courts of Common Pleas.

(Brief in Support of Department's Motion, p. 8-9) (citing *Machipongo,* 719 A.2d at 28; 42 Pa. C.S. § 931 (Original jurisdiction and venue)). The permits issued by the Department simply authorized Rice to conduct drilling in accordance with the applicable statutes and regulations; they did not grant any property rights to Rice. Nor did the permits deprive the Scotts of the use of their coal for a public benefit, such as that described in *Lucas* or *Loretto*.

Under the Scotts' theory, virtually all permitting actions of the Department could be subject to a takings claim if they involve a dispute over private property. We agree with Rice's analysis that the public policy implications of adopting the Scotts' position are far-reaching and unworkable:

> If the Scotts were correct, DEP would be subject to nearly endless claims of takings because DEP is not and cannot be the arbiter of property rights disputes that exist adjacent to its role as the agency responsible for issuing environmental and regulatory permits.

(Permittee's Brief in Opposition to Appellants' Motion, p. 7-8) (citing *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587, 600, and *Abod*, 1997 EHB at 885-86.) It is well-established that the Department may not resolve contract disputes or questions of title. *Rausch Creek*, 2013 EHB at 600 (citing *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229; *Coolspring Stone Supply v. DEP*, 1998 EHB 209, 213). Additionally, the existence of a dispute does not in and of itself preclude the Department from issuing a permit as a matter of law. *Id.* (citing *Columbia Gas Transmission Corporation v. DEP,* 2003 EHB 676, 698; *Coolspring Stone Supply*, 1998 EHB at 213-14; *Chestnut Ridge*, 1998 EHB at 229-30).

The Scotts also argue that the Department's determination that their coal is non-workable constitutes a taking because it deprives them of all economically beneficial use of their coal. Again, as we have already stated, the Scotts have not been deprived of the use of their coal for a public benefit, which is an essential element of a takings claim. The Department has not come in and prevented the Scotts from mining their coal so that the land can be used for a purpose serving the greater good. The Scotts themselves do not identify any public purpose that has been served by the alleged taking of their coal. Rather, this matter boils down to a private dispute between the Scotts and Rice/EQT over royalty payments and the latter's right to enter the Scotts' property for the purpose of gas drilling. The Department's determination that the Scotts' coal was non-workable was not done for any public benefit, but for the purpose of determining whether the Scotts' consent was required under Section 7 of the Coal and Gas Resource Coordination Act (the Coordination Act), Act of December 18, 1984, P.L. 1069, *as amended*, 58 P.S. §§ 501-518, at § 507, before Rice could begin drilling. That statutory provision states as follows:

> (a) No permit for a gas well covered by this act may be issued to drill a new gas well…unless the proposed gas well is located not less than 1,000 feet from any other well. For the purpose of this section, "other well" shall not include any:
>
> (1) Oil or gas well or injection well which does not penetrate a workable coal seam.
>
> *****
>
> (b) The department shall, upon request of the permit applicant or the owner of the workable coal seam which underlies the proposed gas well, grant an exception from the minimum 1,000 feet distance requirement of subsection (a), where the permit applicant and the owner of the workable coal seam consent in writing.

58 P.S. § 507(a) and (b) (emphasis added). Where the coal seams are not workable, consent of the coal owner is not required. Coal seams are "workable" if, "in the judgment of the Department," they "can reasonably be expected to be mined." Id. at § 502. Thus, in determining whether the Scotts' coal seams were workable, the Department was simply exercising its discretion pursuant to Section 2 of the Coordination Act. While the Scotts may disagree with the Department's finding of non-workability, the Department's decision did not result in a taking.

The Scotts rely heavily on *Gardner v. DEP*, 1995 EHB 1150. However, those facts differ greatly from the situation here. In *Gardner*, a predecessor agency of the Department, the Department of Forests and Waters (the DFW), filed a declaration of taking of the appellants' land for the purpose of using that tract of land for Moraine State Park. At the time, the DFW declared it did not intend to deprive the owners of the right to surface mine their coal. Subsequently, the Surface Mining Conservation and Reclamation Act was revised to prohibit surface mining within 300 feet of a public park. Following a remand from the Commonwealth Court, the Board found

that the statutory prohibition, in conjunction with the Department's[7] refusal to grant a variance, resulted in a taking of the appellants' property.

In contrast, in the Scotts' case there is no statute that has denied them the ability to mine their coal, nor a request for a variance that has been denied. The Department has not declared their coal unworkable for the purpose of establishing a public park. Rather, the Scotts entered into a private agreement with EQT and Rice for the drilling of gas wells on their property, which necessarily impacted their ability to mine their coal (assuming it is mineable).[8] The Department's determination that their coal was not workable was undertaken simply as part of the statutory process established for regulating that drilling. It was not a taking.

We believe that adopting the Scotts' theory that the Department's actions in this case constitute a taking "would stretch the concept of a constitutional taking far beyond the notion [that] property owners should be reimbursed when they are forced to sacrifice the property for the *public good*." *Sedat*, 2000 EHB 927, 949 (emphasis added). What lies at the heart of this case is a contract dispute between two private parties - the Scotts and Rice/EQT - over the right to drill through the Scotts' coal and the payment of royalties for their gas. The Department's designation of the Scotts' coal as non-workable brings no benefit to the public. In evaluating the Scotts' claim, we ask the following question: Were the Scotts "treated so unfairly that the *public* should reimburse [them]?" *Id.* (emphasis added). The facts of this case do not lead us to that conclusion.

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[7] The variance denial was made by the Department's immediate predecessor, the Department of Environmental Resources.

[8] We understand that the Scotts claim to have revoked the Permission to Drill. However, to the extent that the Gas Lease, as ratified and amended, remains in effect, we simply point out that the Scotts cannot benefit from the drilling of gas on their property while at the same time claim they have been deprived of the ability to mine the coal impacted by the drilling of that gas.

We need not reach the question of whether the Scotts' coal is workable or whether their consent was required under the Coordination Act. Even if the Scotts are able to prove both of these issues, they have not demonstrated the legal elements of a takings claim. For the reasons set forth above, we find that the Department and Rice are entitled to summary judgment on the question of whether the Department's issuance of the 2022 well permits and determination of non-workability of the Scotts' coal seams constitutes a taking in violation of the U.S. Constitution and Pennsylvania Constitution.

Other Objections Raised in the Notice of Appeal

The Scotts also argue in their appeal that the Department's actions in issuing the permits and designating the Scotts' coal seams as non-workable were "arbitrary and capricious, contrary to the law and evidence, and constituted a deprivation of due process." (Appellants' Memorandum in Opposition to Department's Motion, p. 18) (See also, Attachment 1 to Notice of Appeal, para. 2.) The Department and Rice assert that the Board's Opinion and Order on Rice's Motion to Dismiss for mootness (the Mootness Opinion), issued on May 15, 2023, 2023 EHB 138, identified the Scotts' takings claim as the sole remaining issue in this matter and dismissed all other issues as moot. That is an incorrect reading of the opinion. The Mootness Opinion held that the appeal could not be dismissed as moot because the Scotts had raised a takings claim. It was not necessary to address each of the objections individually since the takings claim prevented dismissal of the appeal. The Mootness Opinion did not dismiss the other objections raised in the appeal, nor could it have done so since it was a single-judge opinion. Dismissal of all or part of an appeal requires the concurrence of a majority of the Board. 25 Pa. Code § 1021.116 (All final decisions shall be decisions of the Board decided by majority vote); 1 Pa. Code § 35.226; 1 Pa. Code § 31.3 (Definition of "agency head" includes "a quorum of an…independent board.") Because we are

dismissing the takings claim, we take this opportunity to address the Scotts' remaining objections and the arguments made by Rice in its Motion to Dismiss and the Scotts in their response.

First, the Scotts assert that they were deprived of due process by the Department during the permit review. Contrary to the Scotts' assertion, the record demonstrates that the Department kept them apprised during the permit review process and sought input from them. This is evident from the Scotts' own exhibits. (See, e.g., Ex. G, H, I to Attachment 1 of Notice of Appeal.) The Scotts were aware of their right to convene a panel to select a location for the wells, but they chose not to avail themselves of it while withholding their consent. (Ex. L to Permittee's Motion.) The record is clear that they were provided with notice and an opportunity to be heard throughout the permitting process. Moreover, it is well-established that "a party's right to due process is met by the opportunity to appeal a Department decision to the Board." *U.S. Trinity Services, LLC d/b/a Trinity Energy Services v. DEP*, 2023 EHB 128 (citing *Kiskadden v. DEP*, 2015 EHB 377, 427-28; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 247; *Kiskadden v. DEP*, 2014 EHB 642, 643-44). Therefore, we find there is no merit to the Scotts' claim that their due process rights were violated.

Second, the Scotts claim that the Department's issuance of the permits and designation of their coal as non-workable was an abuse of discretion and error of law. (Memorandum of Law in Opposition to Department's Motion, p. 18-20.) Rice contends that this claim is moot because the wells have been drilled. "It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131 (quoting *In re Glancey*, 518 Pa. 276, 282 (1988)). We agree that this issue is moot. Even if the Board were to find in favor of the Scotts on the question of whether the Department erred or abused its discretion in designating their coal as

non-workable, the coal has been drilled and the surrounding coal is sanitized. There is no relief that the Board can grant, including monetary damages.

The Scotts argue that this issue continues to present a live controversy. They contend that a finding by the Board that their coal seams are workable will impose additional obligations on Rice under the Coordination Act and the Oil and Gas Act with regard to the operation of its wells. However, the Scotts do not identify how any of these additional obligations affect them. Moreover, Rice is already subject to such requirements based on the workability of the Pittsburgh coal seam, which was also drilled at the same time as the Scotts' coal. (Exhibit K to Attachment 1 of Notice of Appeal.)

Additionally, the Scotts argue that this case presents exceptions to the mootness doctrine. They argue, first, that this matter is capable of repetition, yet evading review because of the speed with which gas drillers may begin drilling after the issuance of a permit. They argue that they should not have been required to file a petition for supersedeas to have their case heard. Given the higher burden that must be met in order to obtain a supersedeas, the Board has recognized that the ability to petition for a supersedeas may not necessarily resolve the "capable of repetition, yet evading review" exception to mootness. *Protect PT v. DEP*, EHB Docket No. 2023-025-W, *slip op.* at 8-9 (Opinion and Order on Motion to Dismiss issued January 10, 2024); *Center for Coalfield Justice v. DEP,* 2018 EHB 758, 764-65. However, here none of the parties have indicated that any additional drilling will be done on the Scotts' property or that the unique circumstances of this case – i.e., drilling within 1,000 feet of another well, thus triggering the Coordination Act – will be repeated.[9] Instead, the Scotts focus on the Department's permitting process in general. They state:

[9] The Permission to Drill lists 14 locations for the drilling of wells by Rice on the Scotts' property. (Ex. D to Permittee's Motion.) However, the Scotts claim to have revoked this agreement and, therefore, it is

> [T]he challenged Department conduct and alleged inadequacy of the Department's statutory well permitting process, non-coal determinations, and enforcement of consent requirements are unquestionably conduct that is repeatedly carried out by the Department as it concerns the numerous well permit applications submitted to the Department each year.

(Appellants' Memorandum in Opposition to Permittee's Motion to Dismiss, p. 22.) This general concern about future permitting actions not necessarily involving the Scotts is not a basis for finding an exception to the mootness doctrine.

The Scotts also argue that this matter involves issues of great public importance, and a decision by the Board could impact future DEP conduct. In particular, the Scotts assert that the Board should rule on the question of what information should be used by the Department in making a determination of whether a coal seam is workable. They state:

> Such a finding could significantly impact the Department's evaluation of future permits and coal seam assessments, and may preclude the Department from using such outdated and imprecise data in the future—particularly where significant property interests are at stake. Further, the Board could find that the Department treats the Technical Guidance Document, not merely as a guidance tool, but as an improper regulatory standard in coal determinations and the issuance of well permits, which could limit or preclude the Department's prospective use of the Guidance Document. This may prevent the Department from creating similar conditions in the future.

(Appellants' Memorandum in Opposition to Permittee's Motion to Dismiss, p. 17.)

The public interest exception to the mootness doctrine is granted only in the rarest of circumstances. *Tinicum Township v. DEP*, 2003 EHB 493, 497 (citing *Pequea Township v. DER*, 1994 EHB 755, 765. The Board has declined in the past to rule on a matter that is otherwise moot

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unclear whether any additional drilling will be conducted. It should also be noted that it is the Department's position that its determination regarding the workability of the Scotts' coal seams was limited to the area where the 2022 wells would be drilled. (Joint Stipulation of Department and Rice, para. 12.)

simply because it might impact future behavior by the Department. In *Consol Pa. Coal Co. v. DEP*, 2015 EHB 49, the appellant argued that a claim should fall under the "matter of great public importance" exception to the mootness doctrine where the challenged action - in that case the Department's application of its Technical Guidance - involves the Department exceeding its lawful authority. In rejecting this argument, the Board held:

> Nearly every single appeal filed with the Board contains an allegation that the Department acted unlawfully and/or arbitrarily and capriciously, i.e., in a manner exceeding its lawful authority. An exception as broad as [the appellant] desires would completely swallow the mootness doctrine…[E]ven if the manner in which [the Department's] decision was reached involved the use of the [Technical] Guidance, by itself, does not create a matter of great public importance and is insufficient rationale for the Board to allow a moot appeal to proceed."

Id. at 64.

Finally, the Scotts argue that if their coal is deemed workable, the Board could halt Rice's operations "until Rice and the Scotts resolve the dispute [over royalties] and the Scotts provide written consent to the permits." (Memorandum in Support of Appellants' Opposition to Permittee's Motion to Dismiss, p. 16.) Much of the Scotts' grievance is with Rice and EQT over property rights and royalty payments. That is not a matter that the Board can resolve. *Pond Reclamation v. DEP*, 1997 EHB 468, 474. Just because there is a continuing controversy between the Scotts and Rice/EQT over the right to drill on the Scotts' property, that does not prevent the appeal before the Board from being moot. *Moriniere v. DER*, 1995 EHB 395, 400.

Because we have determined that these issues are moot, the Board does not reach the question of whether the Scotts' coal seams are workable. We take no position on the Department's determination of non-workability.

We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLAS SCOTT and LINDA MARIE SCOTT	:	
	:	
v.	:	**EHB Docket No. 2022-075-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RICE DRILLING B, LLC, Permittee	:	

O R D E R

AND NOW, this 29th day of April, 2024, it is hereby ordered as follows

1. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that the Department's issuance of the permits and designation of their coal as non-workable constitutes a taking.
2. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that they were deprived of due process.
3. Summary judgment is **granted** to the Department and Rice on the Scotts' claim that the Department acted contrary to law and abused its discretion by issuing the permits and determining that the Scotts' coal seams that were impacted by the drilling of the 2022 wells were not workable because we have determined that these issues are moot.
4. This appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr,
PAUL J. BRUDER, JR.
Judge

DATED: April 29, 2024

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(via electronic mail)

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