BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	**NOTICE OF IN-PERSON HEARING**
	)	
KINZUA RESOURCES, LLC, an Oregon limited liability company;	)	
ATR SERVICES, INC., an Oregon corporation;	)	
GREGORY M. DEMERS, an individual,	)	OAH Case No.: 1403637 Agency Case No.: LQ/SW-ER-11-108
AND	)	
FRONTIER RESOURCES, LLC, an Oregon limited liability company	)	

PLEASE TAKE NOTICE that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

Hearing Date: **December 9, 2014 through December 10, 2014** **Hearing Time:** **9:00 am**

Location: **DEQ-Portland Office**
811 SW 6th Ave
Portland OR 97204

Your case has been assigned to **Administrative Law Judge Joe Allen** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Joe Allen
Office of Administrative Hearings
7995 SW Mohawk St.
Tualatin, OR 97062
Fax: (503) 612-4340

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 947-1579 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

You are required to notify the Office of Administrative Hearings at (503) 947-1579 immediately if you change your address or telephone number prior to a decision in this matter.

CERTIFICATE OF MAILING

On October 17, 2014, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 1403637.

By: First Class and Certified Mail
Certified Mail Receipt # 7013 2630 0002 3662 2801

Lawrence Gildea
Attorney at Law
PO Box 518
Creswell OR 97426

By: First Class Mail

Jeff Bachman
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Gary Vrooman
Assistant Attorney General
Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland OR 97201

Ryan Clark
Administrative Specialist
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.

2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.

3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.

4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.

5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.

6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.

7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.

b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

a. The evidence is unreliable;

b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

12. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the administrative law judge may grant you additional time to submit such evidence.

13. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the administrative law judge. A copy of the tape is available upon payment of a minimal amount, as established by DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

Notice of Hearing- Notice to Members of the Armed Forces

A member of the Armed Forces (Army, Navy, Air Force, Marines, Coast Guard and National Guard) may be subject to the protection of the Servicemembers' Civil Relief Act (SCRA) 50 USC § 501 et seq. as amended. The SCRA provides certain protections to service members and their dependents, if specific conditions are met. If you qualify under the SCRA, you may be entitled to have the matter pending before the Office of Administrative Hearings (OAH) delayed (stayed) due to your military service. The SCRA also provides other protections. Service members may contact the Oregon State Bar toll-free inside Oregon at (800)452-8260 or (503) 620-0222 or the Oregon Military Department toll-free at (800)452-7500 for more information. The United States Armed Forces Legal Assistance Legal Services Locator website may be accessed at legalassistance.law.af.mil.

In order to qualify for the protections of the SCRA, a service member must show that he/she is: (1) an active duty service member; or (2) a member of the reserve component activated to serve in active federal service; or (3) a National Guard service member under Title 10 of the US Code; or (4) a National Guard service member under Title 32 of the US Code called to active duty for 30 days or more pursuant to a contingency mission specified by the President or Secretary of Defense or serving on Annual Training orders. Some provisions of the SCRA also cover dependents of qualifying service members who rely on the service member for at least half of their income. The SCRA continues to provide some protections for a short period of time after service is concluded. Additional protections may be available under ORS 399.238 if you are a member of the Oregon National Guard. It is important that you be aware of your dates of service at the time you contact the OAH and at hearing.

If you think you may qualify under one of the above criteria it is important that you notify the OAH, and the agency that initiated the action, prior to your hearing date so that steps can be taken to ensure that your rights under the SCRA are followed. You may also contact your Judge Advocate General at the installation where or near where you serve or your chain of command for more information regarding your rights under the SCRA.

Notice to Veterans of the Armed Forces

In 2011, the Oregon Legislature enacted Senate Bill 241 (SB 241). The purpose of SB 241 is for state agencies to assist in informing veterans of access to benefits. The Oregon Department of Veteran's Affairs has published a 40-page comprehensive benefit magazine containing state and federal veteran benefits information including: the disability claims process; contact information for veterans services offices; how to access health care; veteran transportation; veteran trauma education; long term care options; dependent and survivor benefits; burial benefits; education options; home loan information; taxation deferral and exemptions; employment resources and preferences; auto adaptive and clothing allowances; IDs, DMV license plates; medals and records; homelessness resources, veterans court's information and recreation benefits and memorials. You can read the entire magazine online at: http://www.oregon.gov/odva/Documents/Veterans%20Benefits%20Magazine%202012%20sm.pdf

You can obtain other information regarding your benefits at:
http://www.oregon.gov/ODVA/pages/index.aspx

Comunicado de Audiencia – Comunicación a Miembros de las Fuerzas Armadas

Los miembros de las Fuerzas Armadas (Ejército, Marina, Aeronáutica, Infantería de Marina, Guardia Costera y Guardia Nacional) podrán aspirar a la protección acordada por "Servicemembers' Civil Relief Act" (SCRA) (Ley de Asistencia Civil a miembros del Servicio) 501 50 USC § y normas relacionadas, conforme a enmienda. El SCRA otorga protecciones a miembros del servicio y a las personas a su cargo que reúnan requisitos específicos. Quienes reúnan los requisitos del SCRA podrán someter su pedido ante el "Office of Administrative Hearings" (OAH) (Oficina de Audiencias Administrativas) solicitando su diferimiento por causa de servicio militar. El SCRA suministra, además, otras protecciones. Para más informaciones, los miembros del servicio podrán contactar el "Oregon State Bar" desde el territorio del Estado a través de su línea gratuita, llamando al (800) 452-8260 / (503) 620-0222 ó al Oregon Militay Department, llamando al (800) 452-7500. Podrá accederse al "Legal Assistance Legal Services Locator" de las Fuerzas Armadas de los EEUU a través de: legalassistance.law.af.mil

Para aspirar a las protecciones del SCRA, el miembro del servicio deberá presentar evidencias de ser: miembro activo del servicio, o (2) miembro del módulo de reserva activado para prestar servicios en el servicio federal activo; o (3) miembro del servicio de la Guardia Nacional, de conformidad al Title (Título) 10 del US Code (Código de los EEUU) o (4) miembro del servicio de la Guardia Nacional de acuerdo al Title (Título) 32 del US Code (Código de los EEUU) llamado para cumplir servicios activos durante 30 días o más en cumplimiento de misiones eventuales especificadas por el Presidente o la Secretaría de Defensa o en servicio de disposiciones de Entrenamiento Anual. Algunas de las provisiones del SCRA cubren también a las personas a cargo de los miembros del servicio que tengan derecho y que representen por lo menos la mitad de su ingreso. El SCRA continuará proporcionando algunas protecciones por un breve periodo de tiempo una vez que el servicio haya sido completado. Los miembros del "Oregon National Guard" podrán contar con protecciones adicionales, de conformidad con ORS 399.238. Es importante que conozca las fechas de servicios, tanto en el momento en que contacte el OAH, como en el momento de la audiencia.

De considerarse encuadrado dentro de los requisitos mencionados, es importante que, con anterioridad a la fecha de audiencia, notifique al OAH y a la agencia en la que inició la acción, de manera de poder tomarse los recaudos necesarios para asegurar que los derechos otorgados por SCRA sean tenidos en consideración. En relación a los derechos mencionados en SCRA y, para mayor información, podrá también contactar al "Judge Advocate General" de la sede en la que presta servicios, a una cercana a ésta, o a su cadena de comandos

Aviso a los veteranos de las fuerzas armadas

En 2011, el Cuerpo Legislativo de Oregon promulgó el Proyecto de Ley del Senado número 241 (SB 241). El propósito del SB 241 es que las agencias estatales ayuden a informar a los veteranos sobre el acceso a beneficios. El Departamento de Asuntos para Veteranos de Oregon ha publicado una completa revista de 40 páginas sobre los beneficios, la cual contiene información sobre beneficios estatales y federales para veteranos incluyendo: el proceso de reclamación por discapacidad; información de contacto de las oficinas de servicios para veteranos; cómo obtener acceso a atención médica; transporte para veteranos; educación sobre trauma para veteranos; opciones de atención médica a largo plazo; beneficios para dependientes y sobrevivientes; beneficios funerarios; opciones educativas; información de préstamos para vivienda; aplazamiento de impuestos y exenciones; recursos y preferencias laborales; adaptaciones para vehículos y asignaciones para ropa; identificaciones, placas DMV; medallas y registros; recursos de vivienda, información legal para veteranos y beneficios recreativos y de monumentos. Puede leer la revista completa en línea en:
http://www.oregon.gov/odva/Documents/Veterans%20Benefits%20Magazine%202012%20sm.pdf
Usted puede obtener más información sobre sus beneficios en:
http://www.oregon.gov/ODVA/pages/index.aspx

Oregon

John A. Kitzhaber MD, Governor

Office of Administrative Hearings
PO Box 14020
Salem OR 97309-4020
(503) 947-1515
FAX (503) 947-1923
TYY: 1-800-735-1232

This concerns your hearing. If you do not understand the enclosed important document, please IMMEDIATELY contact the Office of Administrative Hearings at 1-800-311-3394.

Spanish:
Esto concierne a su audiencia. Si no entiende el importante documento adjunto, por favor comuníquese INMEDIATAMENTE con la Oficina de Audiencias Administrativas (Office of Administrative Hearings) llamando al 1-800-311-3394.

Vietnamese:
Tài liệu này liên quan đến phiên điều giải của quý vị. Nếu quý vị không hiểu rõ hồ sơ quan trọng đính kèm, xin vui lòng liên lạc NGAY với Văn Phòng Điều Giải Hành Chánh (Office of Administrative Hearings) số 1-800-311-3394.

Russian:
Этот документ имеет отношение к Вашему слушанию и является важным. Если Вы не понимаете приложенный документ, пожалуйста, НЕМЕДЛЕННО свяжитесь с Управлением административных слушаний (Office of Administrative Hearings) по телефону 1-800-311-3394.

Chinese:
隨附重要文件，相關您的聽證一事。如果您不理解這些文件的內容，請立即與行政聽證處（Office of Administrative Hearings）聯絡，電話號碼是1-800-311-3394.

Korean:
이것은 귀하의 심의회에 관계되는 서류입니다. 동봉한 주요 서류를 이해하지 못하시면 즉시 심의회 행정실(Office of Administrative Hearings, 1-800-311-3394) 로 연락하시기 바랍니다.

Romanian
Aceasta se referă la audienţa dumneavoastră. Dacă nu înţelegeţi documentul important inclus, vă rugăm să contactaţi IMEDIAT Biroul de Audienţe Administrative (Office of Administrative Hearings) la 1-800-311-3394.

Laotian:
ນີ້ແມ່ນກົ່ວກັບຂະ ທຸລະກິດ ທີ່ທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈເອກະສານສຳຄັນທີ່ແນບມານີ້, ກະລຸນາຕິດຕໍ່ກັບຫ້ອງການບໍລິການການຂະ ທຸລະກັນທີ່ (Office of Administrative Hearing) ຕາມເລກໂທ 1-800-311-3394

Arabic:
يتعلق هذا الإشعار بالجلسة الإدارية التي حددت لك. إذا تعذر عليك فهم الوثيقة المرفقة, نرجوك الاتصال في الحال بمكتب الجلسات الإدارية (office of Administrative Hearings) بالرقم التالي1-800-311-3394.

Cambodian:
 លិខិតនี้ទាក់ទងនឹងការកាត់ក្តីរបស់អ្នក ។ បើអ្នកមិនយល់ពីឯកសារសំខាន់ដែលភ្ជាប់ជាមួយរបស់ សូមទាក់ទងមក ភ្លាមៗនៅការិយាល័យសវនាការរដ្ឋបាល (Office of Administrative Hearings) តាមលេខ 1-800-311-3394

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: Kinzua Resources

CASE NUMBER: 1403637

ALJ: Joe Allen

DATE MAILED: 10/17/2014

HEARING NOTICE
Hearing Date: 12/9/2014 – 12/10/2014

Thanks, Ryan

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits. RC

1. Article Addressed to:

Lawrence Gildea
Attorney at Law
PO Box 518
Creswell OR 97426

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☒ Agent ☐ Addressee

B. Received by *(Printed Name)* DENNIS MARXEN
C. Date of Delivery 10-20-14

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City, State, ZIP+4

Lawrence Gildea
Attorney at Law
PO Box 518
Creswell OR 97426

PS Form 3800, August 2006 See Reverse for Instructions

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	) **RULINGS ON MOTIONS FOR**
	) **SUMMARY DETERMINATION AND**
KINZUA RESOURCES, LLC, an	) **CROSS MOTIONS FOR SUMMARY**
Oregon limited liability company,	) **DETERMINATION**
ATR SERVICES, INC., an Oregon	)
corporation,	)
GREGORY M. DEMERS, an individual,	)
and	)
FRONTIER RESOURCES, LLC, an	) OAH Case No.: 1403637
Oregon limited liability company,	) Agency Case No.: LQ-SW-ER-11-108
	)
Respondents.	)

HISTORY OF THE CASE

On August 12, 2013, the Department of Environmental Quality (DEQ) issued an Amended Notice of Civil Penalty Assessment and Order (Amended Notice) to Kinzua Resources, LLC (Kinzua), ATR Services, Inc. (ATR), Frontier Resources, LLC (Frontier), Edward J. King, Gregory M. Demers, and Jeffrey D. Demers (collectively, Respondents). The Amended Notice proposes imposing a civil penalty of $790,062, in addition to mandating Respondents to comply with certain requirements.

On August 22, 2013, attorney John Spencer Steward filed a request for hearing on behalf of Respondent Edward J. King. On August 23, 2013, attorney Larry O. Gildea filed a request for hearing on behalf of Respondents Kinzua, ATR, Frontier, Gregory M. Demers, and Jeffrey D. Demers. On January 14, 2014, DEQ issued a determination in which it dismissed Edward J. King as a Respondent in this case.

DEQ referred the case to the Office of Administrative Hearings (OAH) on March 31, 2014. The OAH assigned the case to Senior Administrative Law Judge (ALJ) Monica A. Whitaker. ALJ Whitaker convened a telephone prehearing conference on May 14, 2014. Jeff Bachman represented DEQ. Mr. Gildea represented Kinzua, ATR, Frontier, and Gregory M. Demers. Attorney Benjamin M. Kearney represented Jeffrey D. Demers. The parties agreed to convene a hearing on September 23 and 24, 2014.

On July 7, 2014, Mr. Gildea filed a Motion to Dismiss of Gregory M. Demers (Motion 1), moving to dismiss Gregory M. Demers as a Respondent in this case.[1] On July 8, 2014, DEQ

[1] Nothing in the Model Rules applicable to OAH contested case hearings specifically addresses a motion to dismiss. OAR 137-003-0630(1) allows a party to request "any order or other relief" by filing a motion

requested an extension of time within which it could respond to Motion 1. On July 9, 2014, ALJ Whitaker granted the extension and set a filing deadline of July 23, 2014. On or about July 9, 2014, DEQ notified the ALJ that Assistant Attorney General Gary L. Vrooman would also be representing DEQ in this matter.

On July 22, 2014, DEQ filed Department's Response to Respondent's Motion and Cross Motion for Summary Determination (Response and Cross Motion 1).

On or about July 28, 2014, DEQ dismissed Jeffrey D. Demers as a Respondent in this case.

On July 30, 2014, Mr. Gildea filed Motion of Frontier Resources, LLC and ATR Services Inc. for Summary Determination (Motion 2). On August 12, 2014, DEQ filed Department's Response to Respondent's ATR Services, Inc. and Frontier Resources, LLC Motion for Summary Determination and Cross Motion (Response and Cross Motion 2.) On August 22, 2014, Mr. Gildea filed a Response of Kinzua Resources, LLC to Department's Cross Motion for Summary Determination (Response of Kinzua).

ISSUES

1. Whether Gregory M. Demers is entitled to a favorable ruling as a matter of law regarding his status as a Respondent in this case.

2. Whether DEQ is entitled to a favorable ruling as a matter of law regarding Gregory M. Demers's status as a Respondent in this case.

3. Whether Frontier Resources, LLC, and ATR Services, Inc. are entitled to a favorable ruling as a matter of law regarding their status as Respondents in this case.

4. Whether DEQ is entitled to a favorable ruling as a matter of law regarding Frontier Resources, LLC, and ATR Services, Inc.'s status as Respondents in this case.

DOCUMENTS CONSIDERED

The following documents were considered:

- The Motion to Dismiss of Gregory M. Demers, along with the Declaration of Gregory M. Demers in Support of Motion to Dismiss of Gregory M. Demers;
- The Department's Response to Respondent's Motion and Cross Motion for Summary Determination, along with the Affidavit of Elizabeth Druback;
- The Motion of Frontier Resources, LLC and ATR Services, Inc. for

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in writing. The motion to dismiss constitutes a request for other relief and is therefore properly before the ALJ. Specifically, Mr. Demers's motion for other relief is akin to a Motion for Summary Determination and is treated as such in this Ruling.

Summary Determination, along with the Affidavit of Larry O. Gildea;
- Respondents' Response to Department's Cross-Motion for Summary Determination; and
- The Department's Response to Respondent's ATR Services, Inc. and Frontier Resources, LLC Motion for Summary Determination and Cross Motion, along with accompanying Exhibit A1.
- The Response of Kinzua Resources, LLC to Department's Cross Motion for Summary Determination.

CONCLUSIONS OF LAW

1. Gregory M. Demers is not entitled to a favorable ruling as a matter of law regarding his status as a Respondent in this case.

2. DEQ is not entitled to a favorable ruling as a matter of law regarding Gregory M. Demers's status as a Respondent in this case.

3. Frontier Resources, LLC, and ATR Services, Inc. are not entitled to a favorable ruling as a matter of law regarding their status as Respondents in this case.

4. DEQ is not entitled to a favorable ruling as a matter of law regarding Frontier Resources, LLC, and ATR Services, Inc.'s status as Respondents in this case.

OPINION

1. Standard of Review for Motion for Summary Determination

Respondents Greg Demers, ATR, and Frontier each seek summary determination regarding their status in this case. Essentially, each of the Respondents asks to be dismissed from this action based on assertions that Kinzua, and no other party, is the sole party that may be found liable for violations under the permit. DEQ also seeks summary determination in this matter, asserting that each of the Respondents is a party to the case. In essence, DEQ seeks a ruling declaring it can seek what amounts to joint and several liability against the Respondents for violations on a landfill covered by the permit. OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Gregory Demers argues that DEQ or the ALJ should dismiss him from this case. He argues that he was not a permittee under Permit No. 1173; that Kinzua was reinstated, as an active limited liability company (LLC), on September 11, 2013 and is an existing LLC as of the date of the motions. He further argues that he at no time agreed to be personally responsible for the liabilities of Kinzua, ATR, or Frontier. Mr. Demers contends that under ORS 63.165(1),[2] he is not personally liable for Kinzua's liabilities.

Similarly, Frontier and ATR argue that they have never agreed to be responsible for any of Kinzua's liabilities; that they are not permittees under Permit No. 1173 and that Kinzua is an existing LLC, responsible for its own liabilities under the permit. Therefore, Frontier and ATR argue, they, too, should be dismissed as Respondents in this case.

Mr. Demers, Frontier, and ATR collectively assert that Kinzua is the only "person" who owns and controls the landfill, as the term is used in the statute.

DEQ argues that Kinzua became an inactive LLC for a period and that Mr. Demers, Frontier, and ATR became liable for Kinzua's liabilities because they owned or controlled the landfill property during that period and are therefore responsible for continuing and renewing the permit. In support of its argument, DEQ relies on ORS 459.205(2), which provides:

> The person who holds or last held the permit issued under subsection (1) of this section, or, if that person fails to comply, <u>then the person owning or</u>

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[2] ORS 63.165(1) provides:

> The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the limited liability company. A member or manager is not personally liable for a debt, obligation or liability of the limited liability company solely by reason of being or acting as a member or manager.

Mr. Demers's argues that under ORS 63.165 he is shielded from the liabilities of Kinzua, but he fails to address the continuing liability placed on a person under ORS 459.205(2).

> controlling a land disposal site that is closed and no longer receiving solid waste must continue or renew the permit required under subsection (1) of this section after the site is closed for the duration of the period in which the department continues to actively supervise the site, even though solid waste is no longer received at the site.

(Emphasis added.)

DEQ argues that Mr. Demers controlled the landfill as demonstrated by his actions and that his liability "is not derived from his role as a member of the LLC[,] rather it is direct liability established by statute that results from his control of the landfill where the permittee has failed to comply with the permit." Response 1 at 3. In its Response 2, DEQ further argues, "Kinzua Resources and the other Respondents, Mr. Demers, ATR Services, and Frontier Resources, have failed to comply with closure and financial assurance requirements * * *." Response 2 at 3. DEQ further argues that Respondents have failed to continue or renew the permit for the landfill and that "[t]his liability is not derived from their roles as members of the LLC, rather it is direct liability established by statute that results from their control of a landfill where the permittee has failed to comply with the permit." Response 2 at 3. DEQ asserts that Kinzua's articles of organization are absent any language that would limit the rights of its members to manage and conduct Kinzua's business. Therefore, DEQ argues, Mr. Demers, Frontier, and ATR had control over the wood waste landfill by virtue of their membership in Kinzua.

Finally, DEQ argues that ORS 459.205(2) "explicitly states that someone other than the permittee, namely the person or persons owning or controlling the landfill, is responsible for continuing the permit when the permittee fails to comply." Response 2 at 3. ORS 459.205(2) provides that when the person who holds or last held the permit issued fails to comply with DEQ's requirements, then the *person* owning or controlling a land disposal site that is closed must continue or renew the permit required under subsection (1) of this section after the site is closed for the duration of the period in which the department continues to actively supervise the site, even though solid waste is no longer received at the site. The statute specifies that the *person* owning or controlling a closed land disposal site is required to continue or renew the permit. The use of "person" is singular and not plural. DEQ appears to interpret the requirement to include multiple persons, including Mr. Demers, ATR, and Frontier. Whether multiple persons may be held to this requirement remains in dispute.

I have considered the facts of this case, as well as the arguments raised in the motions and cross motions, and conclude genuine issues of material fact remain in dispute pertaining to who owned or controlled the land disposal site, specifically during the period during which Kinzua was an inactive LLC. In addition, the motions fail to clarify the legal question of how the term "person" should be interpreted and applied in this case. Therefore, it is inappropriate to grant summary determination, in either party's favor, regarding the status of Mr. Demers, Frontier, or ATR as Respondents in this case. The hearing scheduled for September 23 and 24, 2014 will proceed as scheduled.

RULING

1. Gregory M. Demers's Motion to Dismiss is DENIED.

2. ATR Services, Inc. and Frontier Resources, LLC's Motion for Summary Determination is DENIED.

3. DEQ's Cross-Motions for Summary Determination are DENIED.

Monica A. Whitaker
Senior Administrative Law Judge
Office of Administrative Hearings